FOR ARGUMENT

Supreme Court, U.S.
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No. 90-1604

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

DAN MORALES,
ATTORNEY GENERAL OF TEXAS,
Petitioner,
v.

TRANS WORLD AIRLINES, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 16, 1991
CERTIORARI GRANTED NOVEMBER 27, 1991

Index

Page

Reference to Appendix to Petition for Certiorari__ia

Chronological List of Relevant Docket Entries___iiia

Plaintiffs' Complaint, Filed January 23, 1989_____1a

Plaintiffs' Motion for a Temporary Restraining Order, Filed January 23, 1989 [with Affidavits and Exhibits]_____25a

Defendant's Affidavit for Authentication of Business Records, Filed January 27, 1989_147a

Defendant's Original Answer, Filed February 10, 1989_____162a

Motion of Pan American World Airways, Inc. for Leave to Intervene, Filed March 15, 1989_____172a

Supplement to Plaintiffs' Motion to Broaden Injunction [Excerpt-one-page advertisement attached as Exhibit B to Exhibit A to the Supplement], Filed April 10, 1989_____198a

Order Granting Motion of Pan American World Airways, Inc. for Leave to Intervene, Signed May 26, 1989_____202a

Affidavit of Herschel T. Elkins [Excerpt from Docket Number 185], Filed July 17, 1989__203a

Reference to Appendix to Petition for Certiorari and to Appendix to Brief for the United States as Amicus Curias

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Order of the United States District Court for the Western District of Texas, Austin Division, granting Preliminary Injunction against Texas, signed January 30, 1989 ____ 48a

Order of the United States District Court for the Western District of Texas, Austin Division, clarifying Preliminary Injunction, signed February 23, 1989 ____ 51a

Order of the United States District Court for the Western District of Texas, Austin Division, broadening Preliminary Injunction to enjoin 33 additional States and to include nine additional air carriers, signed April 26, 1989 ____ 52a

Order of the United States District Court for the Western District of Texas, Austin Division, broadening Preliminary Injunction to include one additional air carrier, signed May 26, 1989 ____ 65a

Order of the United States District Court for the Western District of Texas, Austin Division, granting Final Judgment and Permanent Injunction against Texas

and 33 additional States, signed June 1, 1990 ____ 8a

Opinion of the United States Court of Appeals, Fifth Circuit, affirming Preliminary Injunction, filed April 3, 1990 ____ 13a

Opinion of the United States Court of Appeals, Fifth Circuit, affirming Final Judgment and Permanent Injunction, filed January 18, 1991 ____ 1a

The following materials have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Brief for the United States as Amicus Curiae:

Exhibit 1 to Appendix of Exhibits accompanying Plaintiffs' Memorandum in Support of Plaintiffs' Motion for a Temporary Restraining Order, Filed January 23, 1989 __ 5a

Chronological List of Relevant Docket Entries

January 23, 1989—Plaintiffs' Complaint filed in the United States District Court for the Western District of Texas, Austin Division.

January 27, 1989—Defendant's Affidavit for Authentication of Business Records filed in the United States District Court for the Western District of Texas, Austin Division.

January 30, 1989—Order entered granting Preliminary Injunction against Texas.

February 10, 1989—Defendant's Original Answer filed in the United States District Court for the Western District of Texas, Austin Division.

February 23, 1989—Order entered clarifying Preliminary Injunction.

March 15, 1989—Motion of Pan American World Airways, Inc. for Leave to Intervene, filed in the United States District Court for the Western District of Texas, Austin Division.

April 10, 1989—Supplement to Plaintiffs' Motion to Broaden Injunction [Excerpt--one-page advertisement attached as Exhibit B to Exhibit A to the Supplement], filed in the United States District Court for the Western District of Texas, Austin Division.

April 26, 1989—Order entered broadening Preliminary Injunction to enjoin 33 additional States and to include nine additional air carriers.

May 26, 1989—Order entered granting Motion of Pan American World Airways, Inc. for Leave to Intervene.

May 26, 1989—Order entered broadening Preliminary Injunction to include one additional air carrier.

July 17, 1989—Affidavit of Herschel T. Elkins, filed in the United States District Court for the Western District of Texas, Austin Division.

April 3, 1990—Opinion of the United States Court of Appeals, Fifth Circuit, affirming Preliminary Injunction.

June 1, 1990—Order entered granting Final Judgment and Permanent Injunction against Texas and 33 additional States.

January 18, 1991—Opinion of the United States Court of Appeals, Fifth Circuit, affirming Final Judgment and Permanent Injunction.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TRANS WORLD AIRLINES, INC., CONTINENTAL AIRLINES, INC., and BRITISH AIRWAYS PLC, Plaintiffs,	§	
v.	§	CIVIL ACTION NO. A-89-CA-067
JIM MATTOX, Attorney General of the State of Texas, Defendant.	§	

COMPLAINT

Plaintiffs Trans World Airlines, Inc. ("TWA"), Continental Airlines, Inc. ("Continental") and British Airways Plc ("British Airways"), by their attorneys, allege for their complaint on knowledge as to themselves and their owr acts and on information and belief as to all other matters, as follows:

THE PARTIES

1. Plaintiff TWA is a corporation organized and existing under the laws of Delaware with its principal place of business at Mount Kisco, New York. As a certificated air carrier, TWA is subject to extensive regulation concerning routes, fares and services by the United States Department of Transportation ("DOT"). TWA advertises its routes, rates and services in newspapers, on radio or television, and in other media available to the public.

2. Plaintiff Continental is a corporation organized and existing under the laws of Delaware with its principal place of business at Houston, Texas. As a certificated air carrier, Continental is subject to extensive regulation concerning rates, routes, and services by the DOT. Continental advertises its rates, routes, and services in newspapers, on radio or television, and in other media available to the public.

3. Plaintiff British Airways is a corporation organized and existing under the laws of England and Wales with its principal place of business at Heathrow Airport in Hounslow, Middlesex, England. As a holder of a foreign air carrier permit, British Airways is subject to extensive regulation concerning rates, routes, and services by the DOT. British Airways advertises its rates, routes, and services in newspapers, on radio or television, and in other media available to the public.

4. Defendant Jim Mattox is the Attorney General of the State of Texas and is sued in his official capacity. The Attorney General is responsible for enforcing the various provisions of Texas law at issue herein.

JURISDICTION AND VENUE

5. This action arises under the Supremacy Clause, Commerce Clause, Compact Clause and the First Amendment of the Constitution of the United States, the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§1301 et seq. (the "Federal Aviation Act"), and the regulations and orders promulgated thereunder by the DOT, and is therefore within the jurisdiction of this Court pursuant to 28 U.S.C. §§1331 and 1337.

6. Venue is properly laid before this Court pursuant to 28 U.S.C §1391 because Attorney General Mattox is a resident of and maintains his office in this district and because Plaintiffs' claims for relief arose in this district. Attorney General Mattox, in concert with numerous other states' attorneys general, has acted through the National Association of Attorneys General (NAAG) to develop and issue NAAG's Air Travel Industry Enforcement Guidelines ("Guidelines"). The threatened enforcement of these Guidelines by Attorney General Mattox, on behalf of himself and other attorneys general in concert, gives rise to this Complaint.

NATURE AND BACKGROUND OF THIS ACTION

7. This is an action for: (i) a declaratory judgment, pursuant to 28 U.S.C. §2201, declaring that any threatened implementation or enforcement of the Guidelines through Texas Bus. & Com. Code §§17.41 et seq., against plaintiffs is unconstitutional insofar as applied to plaintiffs' conduct relating to rates, routes or services, including their advertising and marketing practices relating thereto, with specific reference to the advertisement of fuel, tax and other surcharges; and (ii) preliminary and permanent injunctive relief, pursuant to 28 U.S.C. §2202 and this Court's inherent equitable powers, enjoining and restraining the implementation of the Guidelines by or on behalf of or in concert with the Attorney General of Texas through enforcement of Texas Bus. Com. Code §17.41 et seq., with respect to Plaintiffs' conduct relating to rates, routes or services, including their advertising and marketing practices relating

thereto, with specific reference to the advertisement of fuel, tax and other surcharges.

8. Pursuant to the Federal Aviation Act, the DOT and its predecessor, the Civil Aeronautics Board ("CAB"), promulgated extensive rules and regulations governing activities related to air transportation by air carriers and foreign air carriers. These extensive federal rules and regulations relate, inter alia, to unfair and deceptive practices in the airline industry, including standards governing price advertising.

9. Congress expressly granted the CAB the authority to promote the public interest through the "prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation . . . ." 49 U.S.C. §1302(a)(7). Not only did Congress specifically prohibit such practices, it further authorized the CAB in Section 411 of the Federal Aviation Act to determine whether any air carrier or foreign air carrier "has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof." 49 U.S.C. §1381. In the event that the CAB finds that a carrier "is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier to cease and desist . . . ." Id.

10. Also, in amending the Federal Aviation Act by the Airline Deregulation Act of 1978, Pub. L. 95-504, 92 Stat. 1705, Congress provided in Section 105, 49 U.S.C. §1305, that "no State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any [interstate] air carrier." 49 U.S.C. §1305(a)(1).

11. Acting pursuant to Congressional authorization, the CAB promulgated regulations governing unfair, deceptive, predatory or anti-competitive practices, 14 C.F.R. Part 399, and particularly pertaining to price advertising, 14 C.F.R. §399.84. Because the Airline Deregulation Act of 1978, supra, would otherwise have limited substantially CAB and DOT authority over unfair or deceptive practices related to air transportation beginning in 1985, Congress acted affirmatively in the CAB Sunset Act of 1984, P.L. No. 98-443, 98 Stat. 1703, to reserve all federal authority over these practices. In the CAB Sunset Act, 49 U.S.C. §1551, Congress transferred "the CAB's authority under Section 411 of the [Federal Aviation] Act, to prevent unfair or deceptive practices" to the DOT. H.R. Rep. Conf. No. 98-1025, 98th Cong., 2d Sess. 15, reprinted in 1984 U.S. Code & Admin. News 2857, 2876. Congress' explicit reason for deciding that "there should continue to be authority in the Federal government to protect consumers against unfair and deceptive practices" was, inter alia, that such Federal Aviation Act authority:

> insures a uniform system of regulation and preempts regulation by the states. If there was no Federal regulation, the states might begin to regulate these areas, and the regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines.

H.R. Rep. No. 98-793, 98th Cong., 2d Sess. 4, reprinted in 1984 U.S. Code Cong. & Admin. News 2857, 2860.

12. On information and belief, NAAG is a voluntary association comprised of representatives of the attorneys general of the fifty states, the District of Columbia, and of various territories. In June 1987, defendant Attorney General Jim Mattox co-sponsored a resolution directing the appointment of a NAAG task force to study the advertising and marketing practices of the airline industry in the United States. The task force was directed to recommend a course of action to NAAG members with respect to alleged consumer concerns in the areas of airline advertising practices, frequent flyer programs, and compensation for denied boarding.

13. The NAAG task force subsequently developed the Guidelines, which purportedly address advertising and marketing practices in the airline industry. (A copy of the NAAG Guidelines is attached as Exhibit "1" in the separately bound Appendix of Exhibits (hereinafter "Appendix") that accompanies this Complaint and Plaintiffs' Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order). According to NAAG, the Guidelines did not establish new laws but were intended to serve as "prosecution guidelines to be used by the states in interpreting their own laws."

14. In September 1987, NAAG circulated a draft of its proposed Guidelines to major airlines, the DOT, and the United States Federal Trade Commission ("FTC"). The comments received from these entities recommended against adoption of the Guidelines. For example, the FTC stated that the task force should refrain from recommending the draft Guidelines and reminded NAAG that the "Federal Aviation Act specifically preempts state regulation of

airline rates, routes, or services." Appendix, Exhibit "2" at 2. Similarly, the DOT, in a letter from its General Counsel dated October 19, 1987, stated that "a number of the recommendations appear to be preempted by the Federal Aviation Act (49 U.S.C. §1301 et seq.) or Department of Transportation (DOT) rules or would unduly burden interstate commerce." Appendix, Exhibit "8" at 1.

15. Notwithstanding these objections, on or about December 12, 1987, NAAG adopted final enforcement Guidelines, stating that they would "serve to advise the airline industry which conduct is permitted and what is prohibited."

16. The Guidelines cover three principal areas. First, they require all advertisements of fares to disclose in a prominent fashion all material conditions connected with the purchase of tickets, specify the manner in which such disclosures should be made, and require that airlines make available a sufficient number of seats on each flight to meet reasonably anticipated demand for any advertised fares. Second, the Guidelines purport to regulate certain terms and conditions of frequent flyer programs. Finally, the Guidelines direct airlines to disclose all terms and conditions of incentives offered to induce passengers to give up their seats on overbooked flights.

17. Although the Guidelines themselves do not have the force of law, NAAG considers them to be interpretations of already existing state laws dealing with unfair and deceptive practices. Indeed, NAAG has asserted that the Guidelines represent "minimally necessary" regulatory requirements. Subsequently, various state attorneys general acting

in concert have taken the position that the Guidelines are proper interpretations of their existing state laws and that they will implement or enforce the Guidelines against air carriers through their various state laws.

18. Following actions by a number of state attorneys general seeking to enforce compliance with the full price advertising and roundtrip pricing sections of the Guidelines, the DOT, acting through its general counsel, sent a letter dated March 2, 1988, to Attorney General Jim Mattox indicating that "[b]oth of these matters are clearly preempted by Federal law." Appendix, Exhibit "9" at 1. The DOT noted that, applying Sections 204 and 411 of the Federal Aviation Act, 49 U.S.C. §§1324, 1381, the CAB adopted a rule that requires full price advertising for all components of the advertised air transportation. Since assuming jurisdiction from the CAB for this rule, the DOT has specifically permitted the type of advertising to which the Guidelines object.

19. One state attorney general who has indicated his intent to take enforcement action implementing the Guidelines' fare advertising provisions is defendant Jim Mattox, the Attorney General of the State of Texas. Acting in his official capacity and in concert with other state attorneys general, Attorney General Mattox, through authorized agents of the Office of the Attorney General of Texas, has threatened to institute enforcement proceedings against plaintiffs if their advertising practices do not conform to the Guidelines. Specifically, on November 14, 1988, Stephen Gardner, Assistant Attorney General of the State of Texas, acting on behalf of the States of Texas, California, Massachusetts, New York, and

Washington, wrote a letter to various airlines, including plaintiffs, to reaffirm the position of such states that "any fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare." (Copies of Mr. Gardner's substantially identical letters to plaintiffs TWA, Continental, and British Airways are attached to the Affidavits of Tracy Britton, John Power, and John Williams, which are Exhibits B, E and G, respectively, to Plaintiffs' Motion for Temporary Restraining Order, which accompanies this Complaint.) Although Mr. Gardner's letter does not expressly refer to the Guidelines, the letter duplicates section 2.5 of the Guidelines, which states that "[a]ny fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare." (Id.) Thus, it is clear that Attorney General Mattox seeks to implement or enforce section 2.5 of the Guidelines through state law.

20. Mr. Gardner's letter indicated that, absent alteration of the advertising, the states would initiate enforcement actions under their respective state laws. It also stated that to allow time to bring the challenged advertising into compliance, no action would be taken until after November 30, 1988, and that any advertisement which appears prior to December 1, 1988, would not be the subject of legal action unless a so-called "deceptive" advertisement appears on or after December 1. Mr. Gardner described his letter as a "formal notice of intent to sue" and as "the final opportunity to cure your [alleged] violation of the state laws." (Id.)

FIRST CLAIM FOR RELIEF

(Preemption by the Federal Aviation Act, as amended)

21. Plaintiffs repeat and reallege paragraphs 1-20 as if fully set forth herein.

22. Section 105(a) of the Federal Aviation Act, 49 U.S.C. §1305(a)(1), as amended by the Airline Deregulation Act of 1978, supra, expressly preempts any state law, rule or regulation relating to airline rates, routes or services. It provides in pertinent part:

> [N]o state . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this Act to provide interstate air transportation.

23. Congress' purpose in enacting Section 105 was to prevent conflicts and inconsistent state regulations from being imposed on air carriers and to preclude the states from impeding Congress' decision to deregulate the airline industry. Congress' express intent was to encourage, develop and attain a uniform air transportation system which relies on competitive market forces to determine the quality, variety and price of airline services. To promote uniformity, the DOT was given the sole responsibility for regulating air carriers in any matters relating to routes, rates or services. Because of the DOT's expertise in air transportation matters, Congress vested it with exclusive authority to administer all consumer-related functions in these enumerated areas.

24. Additionally, Section 411 of the Federal Aviation Act prohibits deceptive or unfair practices and specifically authorizes the DOT, as the CAB's successor, to:

> investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

49 U.S.C. §1381(a) (Section 411).

25. In the CAB Sunset Act of 1984, Congress transferred the CAB's existing authority under Section 411 to the DOT. 49 U.S.C. 1551(b). Congress confirmed that such authority was intended to "insure[ ] a uniform system of regulation and preempts regulation by the states." H.R. Rep.98-793, 98th Cong., 2d Sess. 4, reprinted in 1984 U.S. Code Cong. & Admin. News 2857, 2860.

26. The DOT has enforced Congress' preemption in Section 105 by regulating all economic factors that go into the provision of a quid pro quo for passengers' fares, such as flight frequency and timing, liability limits, reservation and boarding practices, insurance, smoking rules, meal service, entertainment, bonding and corporate financing. The

DOT also has expressly indicated that it intends to occupy this field completely pursuant to Congress' direction in Section 105.

27. The DOT has also consistently exercised its enforcement authority under Section 411. Likewise, the DOT, through its General Counsel, has interpreted Section 411 and its implementing regulations, 14 C.F.R. Part 399 and DOT Orders 85-12-68, 88-3-25, and 88-8-2, as preempting regulation by the states of allegedly deceptive or unfair price advertising practices covered by the Guidelines. (Certified copies of the referenced DOT orders appear in the Appendix as Exhibits "5", " 6", and " 7", respectively .)

28. The NAAG Guidelines directly conflict with Congressional action and intent by seeking to regulate an airline's allegedly deceptive advertising of its rates, routes and services . See 14 C.F.R. §399. 84 (1988); DOT Orders 85-12-68, 88-3-25 and 88-8-2. (Appendix Exhibits "5", "6", and "7.") Therefore, the Guidelines and any threatened enforcement actions are expressly preempted by federal law.

29. The three broad areas which are covered by the Guidelines -- fare advertising, frequent flyer programs, and denied boarding compensation -- and which Attorney General Jim Mattox is threatening to enforce through Texas Bus. & Com. Code §§17.41 et seq. are all directly related to price advertising, 14 C.F.R. §399.84, and are integrally "related to rates, routes and services." Indeed, NAAG has expressly acknowledged that one likely effect of the Guidelines will be to cause airlines to eliminate substantive conditions associated with discount fares because of

the onerous and unlawful disclosure requirements which the Guidelines impose. Furthermore, given the Guidelines' complicated disclosure requirements, it is likely that airlines will place less broadcast advertising of their air fares than is now the case. The consequential loss of the ability to effectively publicize fare reductions will remove airlines' incentive to cut fares. Thus, Sections 105 and 411 mandate the preemption of the Guidelines as they are enforced through state law, including Texas Bus. & Com. Code §§17.41 et seq.

30. Even absent Sections 105 and 411, the Guidelines construed in conjunction with Texas and other state law are preempted due to the uniform federal regulatory scheme that governs airline advertising, particularly of international rates, routes and services. The scheme of federal regulation leaves no room for supplementary state regulation of allegedly deceptive advertising of an airline's rates, routes and services.

31. The Federal Aviation Act, as amended, and the DOT's implementing regulations, interpretations and practices, comprehensively deal with fare advertising, frequent flyer programs and denied boarding compensation. State enforcement activity in the areas that attempt to dictate acceptable modes of business activity by the plaintiffs cannot co-exist with federal law on the same subjects, because it stands as an obstacle to implementing Congress' express decision to deregulate the domestic industry as a matter of national policy.

32. Certain provisions of the Guidelines as construed in conjunction with Texas state law are preempted for the additional reason that they conflict

in words or in effect with existing federal law. Specifically, pursuant to the requirements of international agreements between the United States and other sovereign nations, and of Section 403 of the Federal Aviation Act, 49 U.S.C. §1373, plaintiffs must file tariffs for their foreign flight schedules:

> Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it . . . . Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe . . . .

49 U.S.C. §1373. Thus, tariffs are expressly required by federal law and permitted to be advertised by Section 403. However, because the tariffs list separately the component parts of the air fares, the Guidelines would prohibit their advertisement contrary to express requirements of federal law. Also, subsections 2.5 and 2.6 of the Guidelines require surcharges to be included in the total price advertised and prohibit the advertisement of one-way fares based on a roundtrip purchase only. Those subsections are in direct conflict with 14 C.F.R. §399.84 and DOT interpretations thereunder such as Orders 85-12-68, 88-3-25 and 88-8-2 (Appendix, Exhibits "5", "6", and "7"), which expressly permit such advertising practices. Indeed, the entire effect of Section 2 of the Guidelines is to decrease or eliminate price competition by airlines, competition which is essential to the success, and indeed is the paramount

goal, of the deregulated air transportation market mandated by the Federal Aviation Act, as amended.

33. Under the Supremacy Clause of the United States Constitution, the Guidelines construed in conjunction with Texas Bus. & Com. Code §§17.41 et seq. or with any other states' laws, are unconstitutional and may not be enforced against plaintiffs.

34. Plaintiffs are incurring unascertainable but real costs and competitive disadvantages by complying with the Guidelines under duress. To the extent the Guidelines restrict advertisements that are expressly required or permitted by Federal statute and regulation, they constitute an impermissible infringement of constitutional rights protected by the Supremacy Clause. Plaintiffs have no adequate remedy at law and have been and will continue to be directly and irreparably harmed if an injunction is not issued.

SECOND CLAIM FOR RELIEF

(Violation of Commerce Clause)

35. Plaintiffs repeat and reallege paragraphs 1-34 as if fully set forth herein.

36. Plaintiffs are involved in interstate commerce and also engage in foreign commerce. They engage in the advertising of their services in the various states and have customers who purchase their services in the various states and internationally.

37. Implementation or enforcement of the Guidelines through various state laws, including Texas Bus. & Com. Code §§17.41 et seq., and as

applied to plaintiffs' interstate and international activities, imposes direct and excessive burdens on foreign and interstate commerce.

38. Unless the Court acts to restrain the threatened enforcement against plaintiffs of Texas Bus. & Com. Code §§17.41 et seq., as construed in accordance with the Guidelines, plaintiffs will be faced with undue and impermissible burdens on their ability to engage in interstate and foreign commerce as a result of the potential for contradictory regulatory obligations imposed by states whose standards differ, or may differ, from those of Texas.

39. Plaintiffs now will be subject to multi-tiered regulations, with conflicting demands imposed by the DOT, the State of Texas and a possible multitude of conflicting state regulations caused by the differing interpretation of the Guidelines by other NAAG members. For example, the Attorney General of New York has a different interpretation from Attorney General Mattox, and another NAAG member, the Attorney General of New Mexico, objects to the Guidelines. Such varying enforcement positions by the NAAG members run counter to Congress' intention of avoiding confusion and inconsistent regulation of the airline industry by providing the DOT with pre-emptive authority in this area.

40. Moreover, to the extent that plaintiffs can run advertisements in compliance with all the different laws of the various states, the exacting detail the Guidelines require to be disclosed will cause the number of such advertisements to decline. This, in turn, will decrease price competition in the industry,

a result directly contrary to Congress' stated national policy, as embodied in the Airline Deregulation Act of 1978.

41. Wholly apart from the issue of the potential for conflicting or differing interpretations of the Guidelines, threatened enforcement action by a single large state, such as Texas, will inevitably have interstate effects. Because it is impossible as a practical matter for plaintiffs to tailor advertisements disseminated through interstate media to meet individual state requirements, a single state will inevitably coerce plaintiffs into conforming their national advertising and marketing practices to those requirements; ultimately, such conformance will be to the requirements imposed by the most restrictive jurisdiction.

42. In addition to the adverse effects on interstate commerce which are posed by the threatened actions of Attorney General Mattox under the NAAG Guidelines, there is also the threat of a serious disruption of foreign commerce. By attempting to regulate the manner in which both foreign and domestic airlines provide and market their air transportation services, Attorney General Mattox is intruding into matters involving the foreign commerce and foreign relations of the United States.

43. The regulatory scheme for international aviation involves a complex combination of federal statutes and international agreements, including over eighty treaties and executive agreements between the United States and other sovereign nations. Because international aviation is governed by treaty and executive agreements, there is always

the possibility of a conflict between these international agreements and U.S. domestic law, and of friction between the United States and foreign governments should domestic laws be applied inconsistently with the requirements of the United States' international obligations. Congress has recognized this possibility and addressed the problem by directing that U.S. laws and regulations be applied consistently with international agreements. See 49 U.S.C. §1502(a). Furthermore, Congress has reserved for the President the exclusive right to disapprove actions by the regulatory authorities, such as rejection of international tariffs, that might disrupt the foreign relations of the United States. See 49 U.S.C. §1461(b).

44. In the area of international relations and the regulation of foreign trade and commerce, the federal government of the United States must speak with a single voice and act through a single government. Under Article I of the United States Constitution, Congress has the exclusive and plenary power to regulate commerce with foreign nations. Through the Federal Aviation Act of 1958, as amended, Congress has delegated this authority in the area of air transportation to the President and the DOT. They alone may speak for the nation. Consequently, the actions of Attorney General Mattox in threatening to implement and enforce the Guidelines under the Texas law have been taken in derogation of the Constitutional allocation of power to the central government to regulate foreign commerce.

45. Under the Commerce Clause and the Supremacy Clause of the United States Constitution, Texas Bus. & Com. Code §§17.41 et seq., and any other states' laws construed in conjunction with the

Guidelines, are unconstitutional as applied to plaintiffs and may not be enforced. The pertinent Texas statutes (and any other state laws) construed in accordance with the Guidelines impose an unreasonable and impermissible burden on the flow of interstate and foreign commerce and unreasonably and impermissibly regulate and affect plaintiffs' conduct in such states.

46. Plaintiffs have been threatened with an enforcement action by the Attorney General of Texas and by other states' attorneys general acting in concert with him, unless plaintiffs comply with the Guidelines. To the extent that plaintiffs are complying with this unconstitutional assertion of power, they are doing so under duress and have been and will continue to be immediately and irreparably harmed for so long as this threat continues. Plaintiffs have no adequate remedy at law.

THIRD CLAIM FOR RELIEF

(Violation of Interstate Compact Clause)

47. Plaintiffs repeat and reallege paragraphs 1-46 as if fully set forth herein.

48. The Compact Clause of the U.S. Constitution states in pertinent part as follows:

> No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . .

U.S. Const. art. I, § 10, cl. 3.

49. The actions of the Attorney General of the State of Texas and the other members of NAAG in their concerted activities in developing, issuing,

and agreeing to enforce the Guidelines through their own states' laws constitute the formation of an illegal agreement or compact among the states. The compact is illegal because it has the effects of both increasing the political power of the states and encroaching substantially on national and international interests that are the exclusive domain of the federal government. Enforcement of the Guidelines clearly encroaches on federal authority "to protect consumers against unfair and deceptive practices" in the air travel industry, as set forth in the legislative history accompanying the CAB Sunset Act of 1984, Pub. L. No. 98-443. H.R. Rep. No. 98-793, 98th Cong., 2d Sess. 4, reprinted in 1984 U.S. Code Cong. & Admin. News 2857, 2860. Congress has not consented to these concerted actions of the states, acting through their respective attorneys general. Because the Guidelines seek to enhance the states' authority quoad the federal government, they violate the Compact Clause.

50. Plaintiffs are being irreparably injured as a result of defendant's illegal and unconstitutional interstate compact. Plaintiffs have no adequate remedy at law. Consequently, plaintiffs are entitled both to a declaration that the Guidelines are void and unenforceable, and an injunction preventing any attempt by the Attorney General of Texas, or any NAAG member in active concert or participation with him, from enforcing the Guidelines through their state laws.

FOURTH CLAIM FOR RELIEF

(Violation of First Amendment)

51. Plaintiffs repeat and reallege paragraphs 1-50 as if fully set forth herein.

52. Commercial speech is protected against governmental suppression or undue regulation by the First Amendment of the United States Constitution.

53. If commercial speech concerns a lawful activity and is not inherently misleading or fraudulent, the government may not restrict the manner, form and content of commercial speech unless the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interests, and the restrictions are no more extensive than necessary to serve that interest.

54. Plaintiffs' fare advertisements and other promotional and informational material are commercial speech. That information concerns a lawful activity -- the provision of airline services -- and is not inherently misleading or fraudulent since it is in conformity with the Orders of the DOT, the federal agency vested with exclusive jurisdiction over consumer protection issues in the airline industry.

55. Neither the state of Texas, nor any other state whose attorney general is actively in concert with Attorney General Mattox, has any cognizable interest in restricting and dictating the manner, form and content of plaintiffs' commercial speech through the application of its respective state laws, including

Texas Bus. & Com. Code §§17.41 et seq., as construed in accordance with the Guidelines. To the extent that there are substantial government interests in regulating, plaintiffs commercial speech, Congress has delegated the sole responsibility for such regulation to the DOT. In any event, the means of regulation which Texas and its companion states have chosen do not directly advance Texas' or any other states' purported interest.

56. Most importantly, the restrictions and dictates that Texas and other states are trying to force plaintiffs to adhere to under threat of enforcement proceedings are overbroad and far more extensive than are necessary to serve any legitimate Texas state interest. The threatened application of Texas' and other states' laws to plaintiffs in this regard constitutes an unlawful prior restraint and is therefore violative of the First Amendment.

57. The per se rules set forth in the Guidelines bear no necessary relationship to whether an advertisement is, in fact, false and deceptive. The Texas Deceptive Trade Practices Act, Texas Bus. & Com. Code §§17.41 et seq., as construed by Attorney General Mattox in conjunction with the Guidelines, is overbroad and fails to adhere to the constitutional requirement that it be no more extensive than necessary to serve the government's interest in regulating commercial speech; in this case, a non-existent interest.

58. Plaintiffs' constitutionally protected rights to engage in commercial speech have been and are being illegally chilled and restricted. To the extent that plaintiffs are complying with this unconstitutional assertion of power, they are doing

so under duress and have been and will continue to be immediately and irreparably harmed for so long as this continues unchecked. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs demand that judgment be entered:

(a) declaring that implementation or enforcement of section 2.5 of the Guidelines through Texas Bus. & Com. Code §§17.41 et seq. or any other state law is unconstitutional as applied to plaintiffs under the Supremacy Clause of the United States Constitution, Article VI, cl. 2;

(b) declaring that implementation or enforcement of section 2.5 of the Guidelines through Texas Bus. & Com. Code §§17.41 et seq. or any other state law is unconstitutional as applied to plaintiffs under the Commerce Clause of the United States Constitution, Article I, § 8, cl. 3, because those laws impose an impermissible burden on interstate and foreign commerce;

(c) declaring that implementation or enforcement of section 2.5 of the Guidelines through Texas Bus. & Com. Code §§17.41 et seq. or any other state law is unconstitutional as applied to plaintiffs under the Compact Clause of the United States Constitution, Article I, § 10, cl. 3, because such implementation or enforcement would be the result of an illegal interstate compact that has not been approved by Congress;

(d) declaring that implementation or enforcement of section 2.5 of the Guidelines through Texas Bus. & Com. Code §§17.41 et seq. or any other state law is unconstitutional as applied to plaintiffs

under the First Amendment of the United States Constitution, because these laws impermissibly restrict constitutionally protected commercial speech;

(e) preliminarily and permanently enjoining the Attorney General of the State of Texas, Jim Mattox, and all other persons acting for or in active concert or participation with the Attorney General or the State of Texas, from taking any action against plaintiffs pursuant to Texas Bus. & Com. Code §§17.41 et seq. or any other state law in conjunction with the NAAG Guidelines as they purport to regulate plaintiffs' rates, routes or services, or plaintiffs' marketing or plaintiffs' advertising of their rates, routes and services;

(f) granting plaintiffs the costs and disbursements of this action, including attorney's fees; and

(g) granting such other and further relief as the Court deems just and proper.

[Signatures omitted in printing.]

[Title omitted in printing.]

PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

Plaintiffs Trans World Airlines, Inc., Continental Airlines, Inc., and British Airways Plc hereby move this Court to issue a temporary restraining order under Rule 65 of the Federal Rules of Civil Procedure, enjoining defendant Jim Mattox, Attorney General of the State of Texas, his agents, servants, employees, and attorneys, and any person in active concert or participation with him, from filing or otherwise instituting any enforcement action under the laws of the state of Texas which would prevent plaintiffs' advertisement of airline fares in a manner consistent with federal law and regulations, including applicable orders and regulations of the U.S. Department of Transportation ("DOT") or its predecessor agencies.

Plaintiffs would show that Attorney General Mattox, in concert with the attorneys general of various other states in the National Association of Attorneys General ("NAAG"), developed and issued Air Travel Industry Enforcement Guidelines ("Guidelines") purporting to govern the airline industry, despite objections from the DOT and the U.S. Federal Trade Commission that implementation of such Guidelines was unconstitutional and would cause confusion to the public, impede competition, and burden commerce. Nevertheless, NAAG finalized the Guidelines and defendant Attorney General Mattox, acting in his official capacity and also on behalf of other members of NAAG, has threatened to implement the Guidelines through the enforcement of state law.

Plaintiffs' motion rests on the substantial likelihood that they will prevail on the merits of their case. Specifically, and in support of this conclusion, plaintiffs state that: (1) they are certificated air carriers and foreign air carriers subject to regulation by the DOT pursuant to its authority under the Federal Aviation Act, as amended; (2) in Section 105(a) of the Federal Aviation Act, 49 U.S.C. 1305(a)(1), Congress has expressly preempted any state regulation "relating to rates, routes, or services" of interstate air carriers; (3) under Section 411 of the Federal Aviation Act, 49 U.S.C. § 1381(a), DOT has full authority to "investigate and determine whether any air carrier [or] foreign air carrier. . . .has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof"; (4) DOT has consistently exercised its enforcement authority under Section 411 and has interpreted Section 411 and its regulations as preempting any state regulation of allegedly deceptive advertising of an airline's rates, routes or services; (5) the NAAG Guidelines unlawfully intrude into the domain of federal law by implementation and enforcement through various states' laws; (6) defendant Attorney General Mattox's threatened implementation of the Guidelines, particularly subsection 2.5, through state law directly conflicts with federal regulations, 14 C.F.R. Parts 221 and 399, and DOT orders, Orders 85-12-68, 88-3-25 and 88-8-2, by requiring plaintiffs to include surcharges in the total price advertised, which federal law specifically permits to be listed separately; and (7) despite federal preemption, defendant Attorney General Mattox, in his official capacity and on behalf of other members of NAAG, has threatened the imminent implementation of the Guidelines

through state law by filing enforcement proceedings against plaintiffs if they do not conform their advertising to the NAAG Guidelines, particularly subsection 2.5. Such threatened implementation and enforcement of the Guidelines through state law contravenes the Supremacy Clause of the United States Constitution.

Moreover, plaintiffs state that the threatened enforcement of the Guidelines by the Attorney General of Texas, or by other states' attorney generals in active concert or participation with him, imposes an undue burden on interstate and foreign commerce in violation of the Commerce Clause; an illegal agreement or compact between states in violation of the Compact Clause (Article I, § 10, cl. 3 of the United States Constitution); and an impermissible restriction on plaintiffs' rights of commercial speech in violation of the First Amendment. Plaintiffs will have a substantial likelihood of success on the merits of these arguments.

Because of the imminent threat of enforcement action by Attorney General Mattox and others in active concert or participation with him, issuance of a temporary restraining order is necessary prior to the hearing on plaintiffs' motion for declaratory and injunctive relief in order to prevent irreparable harm to plaintiffs. Plaintiffs face irreparable harm by the threatened unconstitutional acts of defendant and by the loss of revenues and customers to other carriers in the airline industry which would result from these acts. Plaintiffs also face the lack of an adequate remedy at law, since plaintiffs' damages flowing from enforcement of the Guidelines can not be predicted, ascertained or even

approximated. There is no potential injury to the defendant that would militate against the granting of a temporary restraining order, and the public interests in free competition, the dissemination of information and advertising, and the continued vitality of a unified federal regulatory regime for the air travel industry will be served by the requested injunctive relief.

This motion for temporary restraining order is based upon the affidavits of (1) Samuel Podberesky, (2) Tracy Britton, (3) Vivian Caudle, (4) Bruce O'Brien, (5) John Power, (6) Jean Zelkovitch, and (7) John Williams, attached hereto as Exhibits A, B, C, D, E, F, and G, respectively, and incorporated herein by reference. Also attached as Exhibit H is a certified copy of the Affidavit of Attorney General Mattox filed in Alaska, et al. v. United States Dep't of Transp., Nos. 88-1348 and 88-1682 (D.C. Cir. filed May 6, 1988) (challenging the propriety of DOT's Orders 88-3-25 and 88-8-2).

Plaintiffs further rely upon the Memorandum in Support of Plaintiffs' Motion for a Temporary Restraining Order and the separate Appendix of Exhibits that accompanies and is being filed contemporaneously with plaintiffs' motion and memorandum in support.

Plaintiffs have filed a proposed Temporary Restraining Order and hereby request and pray that this Court grant the relief requested in such proposed order.

[Signatures omitted in printing.]

[Exhibit A to
Motion for Temporary Restraining Order]

[Title omitted in printing.]

AFFIDAVIT OF SAMUEL PODBERESKY

BEFORE ME, the undersigned authority, personally appeared Samuel Podberesky, who being by me sworn, deposes and states as follows:

1. My name is Samuel Podberesky. I am over the age of 21 years, have never been convicted of a crime, and have personal knowledge of all the facts and opinions contained herein.

2. I am the Assistant General Counsel for Aviation Enforcement and Proceedings of the U.S. Department of Transportation. In this position I have primary legal responsibility for the enforcement of the Department's economic regulations affecting air transportation and related statutory provisions. My office is assisted in that function by the Consumer Office within the Office of the Assistant Secretary for Government Affairs. I have been in my current position since March 1986.

3. Among the enforcement matters with which my office deals are cases involving actual or potential violations of section 411 of the Federal Aviation Act, 49 U.S.C. §1381, which prohibits deceptive advertising. In carrying out this enforcement function, my office is assisted by the policy guidance contained in 14 C.F.R. Part 399. For example, 14 C.F.R. §399.81 indicates that enforcement action may be taken pursuant to section 411 for unrealistic scheduling of flights. Similar enforcement action may be taken in accordance with

section 399.88 for failures by airlines to disclose code-sharing arrangements to customers.

4. 14 C.F.R. §399.84 provides policy guidance on airline price advertising. In this connection, since June 1987 the Department has issued a number of enforcement orders at my office's behest directing tour operators and air carriers to cease and desist from deceptive advertising (including deceptive price advertising) and to pay civil penalties. See *e.g.*, Orders 88-4-63, 88-4-33, and 87-6-6.

5. When I assumed my current position, section 399.84 had been in effect for several years and Order 85-12-68 (December 24, 1985) had been in effect for several months. Order 85-12-68 provides that the U.S. departure tax imposed by 26 U.S.C. §4261(c) could under specified conditions be stated separately from the airfare in price advertisements. (A copy of that order is attached as Exhibit A to this Affidavit).

6. During 1986, the Department's Consumer Office, which regularly review air travel advertisements, informed me that some airlines had been listing newly enacted custom and immigration fees in a manner similar to the departure tax. I personally confirmed that information by reviewing a number of newspaper ads.

7. Within the Department, there was discussion as to whether enforcement action should be instituted against such practices or whether the separate listing of these fees should be allowed. My office and the Consumer Office determined to permit separate listings, on the basis that it was consistent with the rationale behind Order 85-12-68 and because the separate listings we reviewed were clearly not

deceptive. After this decision was made, carriers were advised of it informally by the staff of my office and the Consumer Office.

8. During the latter part of 1986, it became apparent that the number of surcharges were proliferating. In addition, my office became aware that such fees and surcharges were being displayed in advertisements in an inconsistent fashion, which created potential consumer confusion. For example, some ads listed a single surcharge for "fees and taxes," while others said that governmental fees were additional but did not state the amount. A few ads did not mention the fees at all.

9. In several instances, we asked carriers to revise their ads to correct the way in which they were listing surcharges. For example, several carriers were told that they could not separately list fuel surcharges for which the amounts were based on the mileage of flights, in part because passengers could not determine the total cost of the trip from the ads in question. Since we determined that the airlines in question had not knowingly acted in a manner inconsistent with a clearly stated Department policy in this regard and since the ads were corrected quickly, enforcement action was not pursued. This is consistent with our usual policy in the area of potentially misleading advertising, which focuses on obtaining compliance rather than assessing civil penalties.

10. Because of the need to provide uniform, formal guidance to the industry, work began on what was to become Order 88-3-25 sometime in late 1986 or early 1987. In view of other priorities, Order 88-3-25 unfortunately was not issued until March 1988. (A

coy of Order 88-3-25 is attached as Exhibit B to this Affidavit). However, the policy reflected in that order has been the enforcement policy applied by the Department since 1986.

11. The monitoring of airline advertisements by my office and the Department's Consumer Office indicated that during the months prior to the issuance of Order 88-3-25, most airlines were not including government-imposed fees and surcharges in the fares, displayed in their price advertisements.

12. After issuing Order 88-3-25, my office asked several airlines to correct price advertisements that had separately listed certain fuel surcharges imposed by their airlines in response to higher per gallon fuel taxes assessed by some local jurisdictions. A separate listing of such surcharges is improper because they are not imposed by a government body on passengers directly, and thus their separate listing could be deceptive. On August 1, 1988 the Department issued Order 88-8-2, a formal clarification of Order 88-3-25, in part to put all carriers specifically on notice of the Department's policy in this regard. (A copy of Order 88-8-2 is attached as Exhibit C to this Affidavit.)

[Signature and jurat omitted in printing.]

[Attachment A to Exhibit A to Motion for Temporary Restraining Order]

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 24th day of December, 1985

Request of the Air Transport Association of America for an exemption from 14 CFR 399.84	Docket 43585
Petition of Balair, AG, et al for emergency rulemaking and 399.80 and 399.84	Docket 43596

ORDER GRANTING EXEMPTION

On November 14, 1985, the Air Transport Association of America (ATA), on behalf of its members, filed a request for an exemption from 14 CFR 399.84, which states the Department of Transportation's policy with respect to price advertising. That section declares that any advertising of flights, tours, or component of tours must state the entire price of the flight, tour, or tour component; failure to comply is an unfair or deceptive trade practice under section 411 of the Federal aviation Act, as amended, 49 U.S.C. 1381 (the Act).[1] ATA asks for an immediate blanket exemption

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[1]When it adopted the price advertising policy statement, the Civil Aeronautics Board (CAB) also amended 14 CFR 380.30. (49 Fed. Reg. 49440 and 49438, December 20, 1984).

with respect to the rule's applicability to air-only scheduled service by direct air carriers, pending initiation of a rulemaking proceeding to amend the regulation. ATA asserts that the rulemaking proceeding conducted in this matter by our predecessor, the Civil Aeronautics Board (CAB), was inadequate to support application of section 399.84 to air-only scheduled service. ATA claims that the thrust of the rulemaking proceeding was directed at charter tour operators, not scheduled air carriers, and that the $3 U.S. departure tax was not at the center of the controversy. Accordingly, it asserts that the air carrier industry had inadequate notice that the rule would apply to air-only scheduled service. ATA further maintains that application to air-only scheduled service i not justified or sensible, because the regulation was intended to curb abuses of the charter tour industry. Logistical problems are also alleged with respect to compliance with the rule.

On November 15, 1985, a group of charter airlines and tour operators (the "Joint Petitioners")[2] filed a petition to review and amend 14 CFR 399.84 and

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Responsibility for these regulations transferred to the Department on January 1, 1985.

Part 380, which governs public charters, was amended to require that any solicitation material from a direct or indirect air carrier, or an agent of either, for a charter, charter tour or a charter tour component state the entire price to be paid by the consumer to the seller or agent for the travel purchased or component of the package. These changes were intended to reduce deceptive advertising by charter and tour operators, and direct and indirect air carriers.

[2]Balair, AG; Charter Travel Corp.; Condor Flugdienst GMBH; DER Travel Service, Inc.; German Charters, Inc.; Homeric Tours; Schwaben Int'l,; Tourlite Int'l, Inc.; Travac Tours and Charters, Inc.; and Travel Impressions, Ltd.

380.30 to the extent necessary to permit all carriers--scheduled and charter--to advertise air fare and tour prices without international departure taxes, provided such taxes are stated elsewhere within each ad and promotional material.[3] They also request interim relief to permit them to advertise in such a manner immediately. In the alternative, they ask that the current regulation be applied to all segments of the industry in a uniform manner. The Joint Petitioners assert that scheduled service operators are not including the tax in their promotional materials, as required by our rule, while the Joint Petitioners are doing so. Thus, they argue, they are at an unfair competitive disadvantage. The Joint Petitioners further state that they do not object to the purpose of the regulation, but believe that the international departure tax is not "central to the substance or spirit" of sections 380.30 and 399.84.

Responsive Filings

Donald L. Pevsner: On November 22, Donald L. Pevsner filed comments in opposition to the requests of both the ATA and the Joint Petitioners. Mr. Pevsner, whose 1982 petition concerning deceptive price advertising practices led to the changes in Parts 380 and 399, argues that the $3 international departure tax should be included in the price of all foreign and overseas air transportation. Mr. Pevsner objects to permitting the $3 fee to be placed at the bottom of an ad in small print. He also alleges that by not including the departure tax in the price, carriers are violating section 411 of the Act and, therefore,

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[3]On November 18, the Joint Petitioners submitted additional examples of carriers allegedly not in compliance with the regulation.

should be enjoined from continuing the practice. Mr. Pevsner further argues that any fee included on a passenger's ticket should be included in any advertising.

Joint Petitioners: The Joint Petitioners filed an answer to the ATA request and argue that any relief granted should apply to the entire industry, not just a portion of the industry. They disagree that the air carrier industry had insufficient notice that the rulemaking was intended to apply to all services including scheduled services, since the NPRM indicated that the rule would be applied to all.

Transamerica Airlines: Transamerica, an air carrier with both scheduled and charter operations, filed a consolidated answer expressing support for an exemption for all segments of the industry, not just scheduled carriers. Granting relief only to scheduled air carriers, Transamerica asserts, would give them a competitive advantage and, therefore, any relief should apply to all operations. Transamerica also points out that there have been no complaints about the treatment of the $3 tax in advertisements.

People Express Airlines: People Express, a scheduled carrier, supports ATA and asserts that the industry was not given adequate notice of the handling of the $3 tax during the rulemaking process. It claims that the primary thrust of the changes to Parts 380 and 399 was to curb abuses in the passenger charter and tour package industry.

People Express asserts that there is no basis to support the rule with respect to air-only scheduled service,

and that the amount in question is de minimus and regulation is not necessary to protect the public.[4]

Carefree David Travel: Carefree David, et al., filed in opposition to the ATA petition and in support of the Joint Petitioners' request.[5] Carefree also notes that the NPRM gave all carriers more than sufficient notice that the proposed rules would apply to all carriers. Carefree further argues that since, as the Department recently recognized in approving "half-round trip" advertising, consumers can distinguish between an advertisement that gives a round-trip price and one that provides a one-way price based on the purchase of a round-trip ticket, consumers similarly should be able to recognize that they must pay the additional $4 tax.[6]

Upon consideration of the petitions and answers, we have decided to grant the request of the Joint Petitioners for an exemption from sections 380.30 and 399.84 to permit the exclusion of the U.S. international departure tax from the total advertised

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[4]People Express also attached a copy of a letter it sent to the Department which questioned the applicability of the rule and the adequacy of notice. People Express did not include a copy of the response, however.

[5]Carefree David Travel Co., Inc.,; Emerald Tours, LTD.; Fantasy Holidays, Inc; Ferien-Service, LTD.; Hispanidad Holidays, Inc.; Rich International Airways, Inc.; Samson Tours, Inc.; Spanish Heritage Tours, Inc.; Spantax, S.A.; Trans National Travel, Inc.; Unitravel Corp.; and Vacation Travel Concepts, Inc.

[6]"Half-round trip" advertising enables, for example, a carrier to advertise a fare which can only be purchased as part of a round trip fare, i.e., New York to London - $99 (based on purchase of round-trip ticket).

price, provided all advertisements clearly state the amount of tax elsewhere in the ad. If the price advertised does not include the U.S. international departure tax, the ad must indicate that the fee is payable by the customer. This means that the industry is free to advertise its services in a variety of ways. This exemption should permit greater flexibility for the industry to advertise its services, while ensuring that the traveling public is informed of the charges they must pay to take advantage of the service offered. This exemption applies to all those that offer service involving the $3 tax and not just scheduled carriers.[7] However, failure to include in the total price or disclose the $3 tax separately will continue to be a violation of section 411. We do not believe that other relief, such as amending the regulation, is necessary in light of the exemption granted by this order.

We therefore reject arguments advanced by Mr. Pevsner that allowing the $3 international departure tax to be stated separately is deceptive to the consumer. It has long been a common practice in the industry to state this tax separately, and we have received no complaints from consumers indicating that they have been deceived by advertisements or promotional materials that display the $3 tax clearly but separately. Under the circumstances, we have no basis at this time to conclude that the practice has a significant potential to deceive consumers. However, as noted above, failure to disclose the tax in some

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[7]While the Department agrees with the Joint Petitioners that the scheduled carriers had adequate notice of the effectiveness of section 399.84, the exemption addresses the question on an industry-wide basis, without giving one segment a competitive advantage over another.

form will be considered a violation of section 411. This disclosure can be accomplished in a number of different ways, such as by including it in the generally-larger typeface stating the price of the trip, or by using an asterisk with a notation.

Therefore, under the authority delegated to the Assistant Secretary of Policy and International Affairs under 49 CFR 1.56, I:

1. Consolidate dockets 43585 and 43596 into docket 43585

2. Deny the petition of the Air Transport Association of America;

3. Grant the request of the Joint Petitioners for an exemption from the provisions of 14 CFR 380.30 and 399.84, so as to permit direct and indirect air carriers for scheduled and charter service and tour operators to state the United States international departure tax separately from other charges in advertisements and promotional materials provided that all such advertisements clearly state the amount of the tax elsewhere in the advertisement and indicate that it must be paid in addition to the advertised price; and

4. Except to the extent granted herein, deny all other requests in docket 43585.

By: Matthew W. Scocozza
Assistant Secretary for Policy and
International Affairs

SEAL

[Attachment B to Exhibit A to Motion for Temporary Restraining Order]

Order 88-3-25

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 10th day of March, 1988

SERVED MARCH 16, 1988

Amendment of exemption to allow separate listing of service fees in advertisements for air transportation. Docket 43585 43596

ORDER AMENDING EXEMPTION

On December 20, 1984, the Civil Aeronautics Board (CAB) adopted the price advertising policy statement, 14 CFR 399.84, declaring that any advertising of flights, tours, or components of tours must state the entire price of the flight, tour, or tour component; failure to comply is an unfair or deceptive practice within the meaning of section 411 of the Federal Aviation Act, as amended, 49 U.S.C. 1381 (the Act).[1]

[1] When it adopted the price advertising policy statement, the Civil Aeronautics Board (CAB) also amended 14 CFR 380.30. (49 Fed. Reg. 49440 and 49438, December 20, 1984). Responsibility for these regulations transferred to the Department on January 1, 1985. Part 380, which governs public charters, was amended to require that any solicitation material from a direct or an indirect air carrier, or agent of either, for a charter tour or a charter tour component state the entire price to be paid by the consumer to the seller or agent for the travel purchased or component of the package. These changes were intended to reduce deceptive advertising by charter and tour operators, and direct and indirect air carriers.

This order amends an exemption from that rule. The amendment allows advertisers to separately list certain service fees and taxes in advertisements as long as the amounts of each charge are listed separately or in total.

BACKGROUND

On November 15, 1985, a group of charter airlines and tour operators (Joint Petitioners)[2] filed a petition with the Department of Transportation to review and amend 14 CFR 399.84 and 380.30 to the extent necessary to permit air carriers – scheduled and charter – to advertise air fare and tour prices without international departure taxes, provided such taxes are stated elsewhere within each ad and promotional material. On December 24, 1985, the Department issued Order 85-12-68, granting an exemption from the provisions of 14 CFR 380.30 and 399.84, so as to permit direct and indirect air carriers for scheduled and charter service and tour operators to state the United States international departure tax separately from other charges in advertisements and promotional materials, provided that all such advertisements clearly state the amount of the tax elsewhere in the advertisement and indicate that it must be paid in addition to the advertised price.

[2] Balair, AG; Charter Travel Corp.; Condor Flugdienst GMBH; DER Travel Service, Inc.; German Charters, Inc.; Homeric Tours; Schwaben Int'l., Inc; Tourlite Int'l., Inc.; Travac Tours and Charters, Inc.; and Travel Impressions, Ltd.

Since the grant of the exemption in late December 1985, there has been a proliferation of other fees and charges, some suggested and imposed by airlines, but most charged for services provided by various U.S. government agencies. In some international markets, there is a security fee for each flight to the United States. In addition, the U.S. government has imposed a $5 customs fee and a $5 immigration fee, and a $1 tourism fee has been proposed for certain international flights. Some States and municipalities have imposed fuel surcharges of varying amounts to ticket charges.

For advertisers to comply literally with current provisions of sections 380.30 and 399.84, the are obligated to include the total cost of all such fees and charges in the advertised price. Advertisers find this difficult because they often advertise the each-way fare and state that roundtrip purchase is necessary to use the advertised price. However, security charges do not apply in all international markets, and immigration and custom fees apply only on the return segment of the trip. Fuel surcharges generally apply only on the flight leaving the State or city making such an assessment and not on the return.

As a result of the variety of additional fees and charges imposed on air travelers for a variety of services, advertisers are confused as to how the charges for such services must be presented (including the charges in the total advertised price for the reasons stated above) and in many instances, readers are not receiving the true picture of what their trip will cost. Some advertisers are stating the total amount of additional charges separately and identifying them as departure tax, custom fees,

immigration fees, etc. Some advertisers are stating the total additional charge separately and merely identifying it as "tax and services." Still others do not state an additional charge separately but merely include the statement that "tax and service charges are not included." Finally, some advertisers make no mention of the additional fees and charges at all. In many cases, readers are not aware of significant additional charges until after they have made their decision to travel based upon the only price stated.

AMENDMENT OF EXEMPTION

We want to continue to allow the industry the freedom to advertise its services in a variety of ways and we want to encourage open price competition. However, we must also ensure that the traveling public is informed of the total amount of charges they must pay to take advantage of services offered. We believe this can best be accomplished in a fashion similar to that involving the $3 U.S. departure tax and mandatory service packages.

We have decided to amend the exemption from sections 380.30 and 399.84 in Order 85-12-68 to permit the exclusion of foreign departure taxes (if collected by the advertiser), customs fees, immigration fees, security fees, agriculture inspection fees, tourist and fuel surcharges and any other surcharges that may be imposed by the U.S. Federal, State or local governments or foreign governments, from the total advertised price, provided all advertisements clearly identify and state the amount of the charges elsewhere in the ad, as a total or separately.

The cost of such surcharges may be included in the total advertised price. If so, the advertiser would not be required to list the charges separately but could

state that they are included. However, if the total advertised prices does not include all amounts for such charges, the cost must be stated clearly and conspicuously elsewhere in one of two ways. First, the total of the additional charges may be stated as one amount, so long as the kinds of charges covered by that amount are itemized. Or if the advertisers choose, they may state separately each of the charges provided and the individual amount for each. The ad must clearly indicate that the additional charges are payable by the customers.

As long as the charges for such services are stated and the services are identified, readers should readily know what they will pay for their complete transportation package. Separate itemization is already required for services comprising "mandatory" package supplements and other special services under our rules. Such disclosure appears to cause no particular compliance problems for advertisers, and, at the same time, we have received few complaints from consumers indicating that they have been deceived by advertisements or promotional materials that in fact identify special services and display the additional charges separately in legible type. We therefore have no basis at this time to deny adequate separate disclosure as a practical remedy to a growing travel industry problem. Nevertheless, failure to disclose all additional costs clearly and conspicuously will be considered an unfair and deceptive practice in the sale of transportation within the meaning of section 411 of the Federal Aviation Act. This disclosure can be accomplished, for example, by including the additional costs in the generally-larger typeface stating the price of the trip or by using an asterisk with a notation showing the total cost of the

additional charges with the kind of charges itemized, or the charges can be stated with each cost presented separately.

ACCORDINGLY:

1. The exemption from the provisions of 14 CFR 380.30 and 399.84 granted in Order 85-12-68 is amended to permit direct or indirect air carriers for scheduled and charter service, including tour operators, to state foreign departure taxes, security charges, custom fees, immigration fees, security fees, agricultural inspection fees, tourism and fuel surcharges, as well as any other surcharges (when these items are collected by offeror) that may be imposed by the U.S. Federal, State or local governments or foreign governments, separately from other charges in advertisements and promotional materials, provided that all such advertisements clearly and conspicuously state elsewhere in the advertisement the amount of such charges and the services such charges cover and indicate that such charges must be paid by the consumer in addition to the advertised price.[3]

2. This amendment becomes effective 30 days after the service date of this order.

By: MATTHEW V. SCOCOZZA
Assistant Secretary for Policy
and international Affairs

(SEAL)

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[3] This action in no way alters the exemption already granted with respect to the $3 U.S. departure tax.

[Attachment C to Exhibit A to Motion for Temporary Restraining Order]

Order 88-8-2

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 1st day of August, 1988

SERVED AUGUST 2, 1988

Clarification of Amendment of Exemption to allow separate listing of service fees in advertisements for air transportation. — Docket 43585 43596

ORDER CLARIFYING AMENDMENT TO EXEMPTION

The Department's policy on advertising air transportation, 14 CFR 399.84, requires that all price advertisements of flights, tours, components of tours state the entire price of advertised flights, tours, or any tour components. Similarly, our policy on public charters, 14 CFR 380.30, requires that all charter solicitation materials from direct or indirect air carriers or their agents state the entire price of their charters, tours, or any tour components. These sections reflect the Department's view of what sort of price advertising constitutes an unfair or deceptive practice within the meaning of section 411 of the Federal Aviation Act.

By Order 85-12-68 (served December 31, 1985), we granted an exemption from sections 399.84 and 380.30 to permit price advertisements that exclude the U.S. international departure tax from the total advertised price as long as they clearly state elsewhere both the amount of the tax and that all passengers must pay it in addition to the price advertised. Subsequently, by Order 88-3-25 (served march 16, 1988), we amended the exemption granted by Order 85-12-68 to allow price advertisements that list certain other taxes and government-imposed or government approved fees separately, provided that the amount of each such charge is included in the advertisement, either separately or as a total.[1] We found that in the aftermath of Order 85-12-68, the number of "other charges" had risen significantly. Most of the new charges were for services imposed or specifically approved by various U.S. government agencies–for example, custom fees, immigration fees, and security charges.

We found that these new charges made it difficult for advertisers to comply fully with sections 399.84 and 380.30. Advertisers often advertise one-way fares, stating that the advertised price is only available as part of a round-trip purchase, but not all of the new charges apply to all itineraries or even to both parts of every round-trip itinerary. For example, security charges do not apply in all international markets.

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[1] Neither Order 85-12-68 nor Order 88-3-25 superseded the requirement in the Internal Revenue Code that the eight percent federal tax on all tickets for domestic air transportation be included in the advertised price (*see* 26 U.S.C. §7275). The instant order likewise leaves this requirement unchanged: the eight percent federal tax may not be listed separately.

Immigration and customs fees apply only to flights to the United States. Fuel surcharges generally apply only to flights leaving the locale where they are imposed and not on incoming flights. With the variety of new chargers and the variation in their applicability, advertisers' confusion over how to comply with sections 399.84 and 380.30 resulted in inconsistent and confusing advertising. Consumers often found it difficult if not impossible to determine precisely what their trips would cost: some advertisements gave no indication at all of additional charges.

Balancing the industry's need to advertise innovatively and competitively against the traveling public's need for accurate price information, in Order 88-3-25 we broadened the exemption we had granted in Order 85-12-68 to permit the exclusion from the total advertised price of foreign departure taxes (if collected by the advertiser), customs fees, immigration fees, security fees, agriculture inspection fees, tourist and fuel surcharges,[2] and any other surcharges imposed by Federal, State, or local governments of the United States or by foreign governments. As in the case of the U.S. international departure tax, all price advertisements still must clearly describe the additional charges and state their

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[2] When we issued Order 88-3-25, we understood that certain governments had imposed fuel surcharges on each ticketed passenger using certain airports and that these surcharges were to be collected by the carriers. Although the U.S. government and foreign governments may impose per-passenger charges on air transportation, state and local governments are prohibited from doing so by section 1113 of the Federal Aviation Act. Section 1113 does not bar state and local government from taxing the sale of tour components other than air transportation, however, or the sale of aviation fuel.

amounts either separately or as a total, and they must state explicitly that these charges must be paid by the consumer in addition to the advertised price. Advertisers still have the option of including surcharges in the total price, in which case they need not list them separately.

Since Order 88-3-25's issuance, confusion has arisen over the meaning of the order's first Ordering Paragraph. That paragraph provides as follows:

> The exemption from the provisions of 14 CFR 380.30 and 399.84 granted in Order 85-12-68 is amended to permit direct or indirect air carriers for scheduled and charter service, including tour operators, to state foreign departure taxes, security charges, customs fees, immigration fees, security fees, agricultural inspection fees, tourism and fuel surcharges, as well as *any other surcharges (when these items are collected by offeror) that may be imposed by the U.S. Federal, State or local governments or foreign governments*, separately from other charges in advertisements and promotional materials, provided that all such advertisements clearly and conspicuously state elsewhere in the advertisement the amount of such surcharges and the services such charges cover and indicate that such charges must be paid by the consumer in addition to the advertised price [footnote omitted, emphasis added].

It has come to our attention that several carriers have interpreted this ordering paragraph overbroadly, as license to list charges separately that are neither levied directly on passengers by a governmental entity nor specifically approved by the U.S. government as separate, per-passenger charges.[3] Apparently, these carriers have reasoned that Order 88-3-25 covers all taxes, charges, fees, and surcharges that Federal, State, local, or foreign governments approve or impose, whether on individual passengers or on the carriers themselves.

This broad interpretation is incorrect and warrants clarification of Order 88-3-25. With respect to government-imposed charges, Order 88-3-25 only exempts those charges that are levied on individual passengers and that the advertisers collect and remit to the levying government. Separate listing of these charges are not deceptive, because it informs consumers of the exact amount that will be collected and passed on to the government. The carriers retains no part of these charges. Not only is separate listing of these charges not deceptive, but we believe that passengers benefit from knowing how much they are paying government entities apart from the fares they pay the carriers.

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[3] Order 88-3-25 expressly allows per-passenger security charges, which the Department has approved (Order 88-4-7), to be listed separately, but we intended to allow separate listing of any per-passenger surcharge that the U.S. government may expressly approve. Security fees have been listed separately in price advertisements since long before Order 88-3-25 explicitly sanctioned this practice, but no consumers have filed complaints, and we have no other evidence that separate listing of these fees is in any way deceptive.

Order 88-3-25 does not exempt per-passenger surcharges that carriers themselves set in response to charges which government entities levy on them without regard to individual passengers. Separate listing of these surcharges could well be deceptive. For one thing, it would give the impression, probably erroneous, that the carrier's own incremental costs were the same for every passenger in every market involved. For another, we would have no reasonable way of determining whether or to what extent any carrier's surcharge accurately reflected its per-passenger costs. Carriers are entitled to recoup their costs, of course, but surcharges set by the carriers themselves and not approved by a government entity as separate surcharges must be included in the total airfare advertised. For example, if a local government imposes a per-gallon tax on aviation fuel purchased at its airport, a carrier is free to impose a surcharge on all tickets for flights departing from that airport. Regardless of such a surcharge's genesis, however, it must be included in the total advertised airfare.

Thus, our policies require the total price advertised to include all government-imposed charges collected from the passenger that are not passed directly to a government entity. We continue to regard separate listing of these government-imposed charges as an unfair or deceptive practice within the meaning of section 411.

ACCORDINGLY:

1. We clarify Order 88-3-25 to exclude from the exemption it grants any price advertisement that lists government-imposed taxes, charges, fees, or surcharges separately when such taxes, charges, fees,

or surcharges are not levied on individual passengers by a government entity and remitted directly to the levying government, and

2. We further clarify Order 88-3-25 to include in the coverage of its exemption not only security fees but any other carrier fee or surcharge that may be approved by the U.S. government for separate imposition on individual passengers.

By: MATTHEW V. SCOCOZZA
Assistant Secretary
for Policy and International Affairs

(SEAL)

[Exhibit B to
Motion for Temporary Restraining Order]

[Title omitted in printing.]

AFFIDAVIT OF TRACY BRITTON

BEFORE ME, the undersigned authority, personally appeared Tracy Britton, who being by me duly sworn, deposes and states as follows:

1. My name is Tracy Britton. I am over the age of 21 years, have never been convicted of a crime, and have personal knowledge of all the facts and opinions contained herein.

2. I am employed by Trans World Airlines, Inc. (TWA) as Staff Vice President - Advertising and Marketing. I have held this title since December 1988. Prior to that time, I was TWA's Director of Advertising and Marketing for two years. I have been employed by TWA since October 1980 and have been involved in TWA's advertising and general retail operations since 1981. I have been individually responsible for TWA's advertising and promotional campaigns since 1986 and am personally knowledgeable regarding those efforts.

3. Besides being familiar with TWA's advertising program since 1981, I am also familiar with the regulatory framework in which major airlines determine and publish their air fares for passenger travel.

4. When establishing and advertising air fares for passengers on its commercial flights, TWA and, I believe, all other domestic American airlines look to federal law and guidelines, as articulated in the Federal Aviation Act and in the rules and

regulations issued by the United States Department of Transportation (DOT) or its predecessor agency, the Civil Aeronautics Board (CAB). Throughout the entirety of my experience in the air travel industry up through 1987, such Federal laws, rules, and regulations had been the exclusive authoritative source of law for what constituted fair, unfair or deceptive practices in the advertising and pricing of commercial air fares. I know of no other governmental body which, prior to that time, attempted to inject itself in this comprehensive air fare regulatory framework. Starting in 1987, the National Association of Attorneys General (NAAG) first exerted pressure on TWA and other airlines to make far-reaching changes in their advertising of commercial air fares.

5. In 1987 and 1988, NAAG issued and forwarded to certain representatives of the air travel industry, including TWA, a copy of a proposed set of guidelines on advertising and marketing practices for air fares ("Guidelines"). Despite the objections of TWA, its competitors in the air travel industry, and even the DOT, NAAG and/or certain of its members recently have indicated their intent to proceed with the filing of a suit or suits under various state consumer protection laws, seeking thereby to control the advertising practices of commercial airlines.

6. The foregoing threat by NAAG and/or certain of its members suggests that in the future, TWA will be compelled to formulate its advertising of air fares so as to comply not only with Federal law, but also with the law of up to 50 states and U.S. territories. If this occurs, there is a great potential for confusion for the customer and inconsistency among the regulations. TWA also faces the possibility of

suits in the courts of the several states which would seek to compel it to alter advertising which already meets the uniform federal standard.

7. Specifically, Texas Attorney General Jim Mattox, a member of NAAG, has let it be known through Stephen Gardner, his assistant attorney general, that Mr. Mattox intends to file suit against TWA, allegedly on the basis of deceptive advertisement of air fares. See the attached true copy of Stephen Gardner's letter of November 14, 1988 to Tom Ahlf, Assistant General Counsel of TWA (Exhibit 1).

8. By taking this position, attorney general Mattox specifically seeks to compel TWA and similarly situated airlines to include in their published air fares and in their advertising the $3.00 international departure fee, the $10.00 customs and immigration fee, and the $10.00 security surcharge which TWA and certain similarly situated airlines currently impose on transatlantic air travel. While the $3.00 international departure fee and the $10.00 customs and immigration fees have been mandated by federal law (since 1970 and 1986 respectively) and are collected by all airlines in the transatlantic market, the security surcharge of $10.00 is levied only by certain U.S. flag carriers. TWA has assessed such a fee since 1986 in connection with security services and other measures against the occurrence of terrorist attacks on American passengers or American property in the transatlantic air travel market.

9. TWA regularly advertises its transatlantic and other rates, routes, and services in newspapers and other publications that circulate in

Texas. All of TWA's advertisements published in the United States fully and completely disclose all three of the transatlantic surcharges in the aggregate. The aggregated charges are usually described in this manner: "$23 U.S. departure tax, security surcharges, federal inspection fees and other government taxes." A representative sample of advertisements published in the national edition of the New York Times during the last three months of 1988 is attached hereto as Exhibit 2. Advertisements in the attached Exhibit 2 are in full compliance with all applicable federal laws, rules and regulations, including DOT rules and regulations. Advertisement of the mandatory transatlantic surcharges separately from the total advertised air fare has been specifically approved by DOT Orders 85-12-68, 88-3-25 and 88-8-2.

10. If TWA is compelled to conform its advertising practices to the NAAG Guidelines with respect to the $23.00 in mandatory fees assessed transatlantic travellers, TWA'S advertising in the broadcast media will necessarily contain less information than under the federal regulatory scheme which the DOT has fostered. Only so much information can be effectively communicated in 30 or 60 second increments. It is generally impossible in 30 to 60 seconds to make all the disclosures which compliance with the NAAG Guidelines will require or make necessary. Hence, less broadcast advertising will be placed, or the advertisements will contain no air fare information at all. Furthermore, without the ability to publicize a fare reduction effectively, the incentive to cut fares will virtually disappear. With a lessening of information available to the public, the market place will not work effectively, either as a pricing mechanism or as a means of disseminating information.

11. Compliance with the NAAG Guidelines will also result in a competitive disadvantage between TWA and foreign flag carriers. TWA already makes a full disclosure in its advertisements of all fees and surcharges, including the $10.00 security surcharge, in full compliance with DOT rules and regulations. (See Exhibit 2.) If TWA is required to incorporate the $10.00 security surcharge in the stated air fare, TWA will appear to be charging a higher air transport fare than its foreign counterparts that do not assess a security surcharge. Thus, besides interfering with the exclusive jurisdiction of the DOT in air fare advertising and compelling TWA to comply with a complicated mix of conflicting rules and regulations, imposition of the NAAG Guidelines will also compel TWA and similarly situated U.S. flag carriers to consider whether their assessment of a security surcharge will place them at a competitive disadvantage with respect to foreign-flag carriers.

12. If compelled to conform its advertising policies to the NAAG Guidelines, TWA also faces the prospect of dealing with inconsistent and conflicting federal and state regulatory schemes. TWA has already been compelled to enter into an informal verbal agreement with the Attorney General of the State of New York, or face the threat of prosecution in that jurisdiction. That agreement with a NAAG member has severely affected the flow of information to the marketplace regarding TWA air fares.

13. For example, in order to comply with its oral understanding with the New York attorney general, TWA has already been compelled to cease its advertising of air fares on radio altogether, since it

was impossible in sixty seconds to disclose the nine different restrictions which NAAG would have required. Television advertising has also been complicated and adversely affected by the increased use of superimposed legends and mandatory audio disclosures. Newspaper advertisements can no longer incorporate a large number of prices for multiple destinations, because of space limitations. For example, in the past, as many as 75 cities and fares may have been listed in a single large advertisement. Now, space limitations have cut this number to 10 or fewer destinations. This latter development has also created a significant disincentive against price competition. The erosion of competition has also exacerbated the decline in the number of fare reductions. "Loss leaders," or price cuts on a limited number of air routes which can be advertised in a single uncomplicated advertisement, have replaced broad-based fare reductions as the result of NAAG's interference.

14. As a further practical matter, if a Texas Attorney General can compel TWA to modify its advertising in a state as large as Texas, it effectively compels TWA to regulate its advertising nationally in conformity to Texas expectations. However, the Attorney Generals of Utah and New Mexico have dissented from the enforcement guidelines which NAAG has announced. Hence, TWA and other similarly situated carriers may be confronted with the specter of more than 50 different state and territorial regulatory schemes, in addition to the already comprehensive federal scheme. This threat is clearly demonstrated by New York and Texas' conflicting interpretations of the NAAG Guidelines. Although TWA is in compliance with the NAAG Guidelines in New York (as modified by oral agreement with the

New York Attorney General), the Texas Attorney General is threatening to proceed with legal action against TWA, based on his apparently conflicting interpretation of the NAAG Guidelines.

15. As noted in the attached Exhibit 2, TWA's advertising on its face discloses the existence of an aggregate of $23.00 in transatlantic fees (including the $3.00 international departure tax, the $10.00 customs fee, and TWA's security surcharge of $10.00 on transatlantic flights). Thus, these advertisements contain nothing that is deceptive or misleading to the citizens of the State of Texas or that violates the State of Texas' consumer protection laws.

16. My staff and I have attempted to estimate the impact on TWA's revenues and the number of passengers who would switch from TWA to a foreign flag carrier if the NAAG Guidelines are implemented. While we are certain that there would be a decrease in revenue and a loss of customers, we have determined it is impossible to determine with precision or even to approximate the magnitude of the damage. The losses in revenue due to competitive disadvantage could vary tremendously in response to fluctuations in the dollar's exchange rate, a resurgence in terrorism directed at the air industry (such as the Pan Am Flight 103 tragedy), the weather in the United States and Europe, the health of the economy over-all, or a change in the identity, number or marketing programs of the airlines involved in the transatlantic air travel market.

[Signature and jurat omitted in printing.]

[Exhibit 1 to Exhibit B to Motion for Temporary Restraining Order]

[Letterhead of Texas Attorney General]

November 14, 1988

VIA FEDERAL EXPRESS

Tom Ahlf, Esq.
Assistant General Counsel
TWA, Inc.
605 Third Avenue, 43rd Floor
New York, New York 10158

Re: Disclosure of fare surcharges in advertisements

Dear Mr. Ahlf:

I am writing on behalf of the States of California, Massachusetts, New York, Texas, and Washington to reaffirm the position of the states regarding fare surcharges in advertisements. It is the position of the states that any fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare. Failure to do so violates our respective state consumer protection laws.

Specific surcharges which must be included in the advertised fare are

- the $3.00 international departure fee,
- the $10.00 customs fee,
- the "security" surcharge (usually $10.00), and

- any fuel surcharge.

It is no defense to claim that the surcharges are disclosed elsewhere in the advertisement. The deception, and thus the violation of our laws, occurs when the advertisement states a specific amount for a fare which is not in fact the true cost because the surcharges have been factored out. This deception cannot be cured by a footnote or other separate reference.

The states do not wish to burden airlines unduly with respect to advertising their fares. Full disclosure in this instance is actually simpler – no footnote is required and there is therefore less "clutter" in the advertisement.

More importantly, our citizens – and your customers – will not be deceived by inaccurate information.

The states are aware that the United States Department of Transportation ("DOT") has taken the position that factoring out some surcharges is proper. In Orders 8-3-25 and 88-8-2, DOT has condemned fuel surcharges but has condoned the three international fare surcharges (departure, customs, and "security").

This position taken by DOT is contrary to its own existing regulation (14 CFR §399.84) which says, in relevant part:

> "[A]ny advertising or solicitation...for passenger air transportation...that states a price...[is] an unfair or deceptive practice, unless the price stated is the entire price to be paid by the customer...for such air transportation... ."

The states believe that DOT itself violated the law when it issued these orders. Accordingly, the states signing this letter, together with 22 other states, have sued DOT for its illegal actions. That case is now pending in the United States Court of Appeals for the District of Columbia Circuit in Washington, D.C. (Docket Nos. 88-1348 and 88-1682). It is scheduled for oral argument on January 23, 1989.

The states are also aware that certain members of the industry have voiced the opinion that state enforcement of our consumer protection laws has been preempted by the DOT. The states disagree. Regardless of whether DOT is willing to allow deceptive advertising, the states are not. Our analysis of the law of preemption in this area convinces us that the states are free to protect our citizens from deception by enforcing our state consumer protection laws. We believe that this position fully comports with the Administration's own policy on preemption as expressed in Executive Order 12612, issued on October 26, 1987.

We are, however, aware that the apparent attempt by DOT to contravene the law by allowing surcharges has possibly created an atmosphere of confusion in the industry. Airlines may believe that they only need to comply with the DOT position.

This is not the case. Airlines may comply with the laws of the states without conflicting with DOT policy, and accordingly they must do so. This letter has been sent to every airline which we have identified as deceiving the public through surcharge advertising. This is the final opportunity to cure your violation of the state laws.

This letter serves as formal notice of intent to sue as required by our respective state laws. If your airline deceptively advertises fares in the future, you will be subject to being sued without further notice or opportunity to cure.

To allow time to bring your advertising into compliance, we will not take action until after November 30. Any advertisement which appears prior to December 1 will not be the subject of legal action by the states signing this letter, *unless* a deceptive advertisement appears on or after December 1.

If you have any questions regarding the position stated in this letter, we encourage you to contact us for further discussions.

It is our desire that, having made our position clear, we may expect cooperation from all airlines in preventing future deception.

Very truly yours,

/s/STEPHEN GARDNER
Assistant Attorney General

[Exhibit 2 to Exhibit B to Motion for Temporary Restraining Order]

Our new low fares will have you watching the clock.

$398
LONDON
ROUNDTRIP

Amsterdam	$428
Copenhagen	$548
Frankfurt	$479
Lisbon	$492
Madrid	$492
Milan	$492
Paris	$499
Rome	$564
Tel Aviv	$679

TWA

Exhibit 2

BEST AVAILABLE COPY

[Text of advertisement on preceding page.]

Our new low fares will have you watching the clock.

What's big?
Lives for the minute?
And goes ticktock?
Good guess. And there's no better time than now to see what's been keeping London ticking for centuries.

Because TWA's new super low fares to London are making a visit to Big Bend, "old Winston," and all of Europe more affordable than ever.

See the sights of London and we'll give you the countryside. Free.

And how's this for a timely deal? Just pay for a 3-consecutive-night stay in one of nine exclusive London Trusthouse Forte Hotels, and we'll give you the next three nights in any 200 specially selected Trusthouse Forte Hotels throughout Great Britain. Free*

Imagine yourself staying in Grosvenor House, the former mansion of the Duke of Westminster in London. Or how about a stay at The Swan, dating from the 14th century in Lavenham?

Just make your advance hotel reservation and stay between now and March 31, 1989. For more information call Trusthouse Forte Hotels directly 1-800-225-5843, and ask about TWA's "Countryside Special."

Drive an Alamo rental car for 3 days. Free.

Starting from the day you arrive in London, you'll get three days free use of an Alamo economy car with unlimited mileage. If you want to keep it longer, the rate is only $17 a day.†

All you do is reserve the car in advance, directly with Alamo, and show your TWA roundtrip ticket when you arrive. For more information, call Alamo at 1-800-732-3232 and ask about TWA's "London Special."

So what are you waiting for?

Isn't it time you set your watch by the granddaddy of them all?

TODAY'S TWA.
FIND OUT HOW GOOD WE REALLY ARE.*

$398 LONDON ROUNDTRIP
KLXNR

Amsterdam KLXNR	$428
Copenhagen KLXNR	$548
Frankfurt KLXNR	$479
Lisbon QLXAP180	$492
Madrid QLXAP180	$492
Milan KLXNR	$492
Paris KLXNR21	$499
Rome KLXNR	$564
Tel Aviv KLXNR	$679

For international fare information, call your travel agent, or TWA in New York at (212) 290-2141, Nassau at (516) 222-9212, Newark at (201) 643-3339, or elsewhere at 1 (800) 892-4141.

"The statute of Winston Churchill looks up at Big Ben in the clock lower of the Houses of Parliament, London"

Fare Conditions: Fares shown are roundtrip. May be nonrefundable, expire prior to other promotional offers shown, have differing advance-purchase and min/max stay requirements, may not be available on all flights or days of week and are subject to change and government approval. Varying effective dates, holidays blackouts, and cancellation/change-of-itinerary penalties apply. Int'l fares do not include $23 U.S. departure tax, security surcharges, federal inspection fees and other gov't taxes Fares/service vary by airport.

TWA

*Hotel Offer: Hotel rooms are subject to availability, and passengers must originate in the U.S. Offer is not combinable with any other Trusthouse Forte promotional or seasonal weekend rates.

†Car Offer: Fuel, taxes and optional items not included. Standard drive qualifications apply. Subject to availability. Offer is not valid 12/16-12/31/88. Ends 3/31/89.

[Exhibit C to
Motion for Temporary Restraining Order]

[Title omitted in printing.]

BEFORE ME, the undersigned authority, personally appeared Vivian Caudle, who being by me duly sworn, deposes and states as follows:

1. My name is Vivian Caudle. I am over the age of 21 years, have never been convicted of a crime, and have personal knowledge of all the facts and opinions contained herein.

2. I am employed by Continental Airlines, Inc. (Continental) as Director of Marketing Services. I have held this position since October 1986. Prior to that time, I was associated with Tracy Locke, an advertising and public relations firm, where I was chiefly responsible for Frontier Airlines' advertising program for one year. As Continental's Director of Marketing Services, I am personally responsible for Continental's domestic advertising and promotional campaigns and its efforts to comply with applicable Federal rules. I am also personally responsible for assuring that all Continental advertising, for both its domestic and international divisions, is reviewed by Continental's legal staff to assure full and fair disclosure of important facts to Continental's prospective customers.

3. Besides having personal knowledge of Continental's advertising program since 1986, I am also generally familiar with the regulatory framework in which Continental determines and advertises to the public its air fares for passenger travel.

4. When setting and advertising its commercial passenger air fares, Continental looks to federal law and guidelines. Specifically, Continental carries out these activities pursuant to the Federal Aviation Act and the rules and regulations issued by the United States Department of Transportation (DOT) or its predecessor agency, the Civil Aeronautics Board (CAB). Throughout my experience in the air travel industry, these Federal laws, rules, and regulations have been considered the final authority regarding allegedly unfair or deceptive practices in the advertising of commercial air fares. I am unaware of any attempts by any other government agency to interfere with or become involved in this federal regulatory framework until 1987. Beginning that year, the National Association of Attorneys General (NAAG) first exerted pressure on Continental and certain other airlines to make far reaching changes in their advertising of commercial air fares.

5. In 1987 and 1988, NAAG issued a proposed set of guidelines on advertising and marketing practices for air fares ("Guidelines"). NAAG furnished Continental with a copy of the Guidelines and requested comments. Despite objections to the Guidelines by Continental and others (including the DOT), NAAG and/or certain of its members have indicated an intent to file suit under state consumer protection laws in order to enforce the Guidelines. By this means, NAAG and/or certain of its members seek to regulate the advertising practices of Continental and other commercial airlines.

6. NAAG's actions strongly suggest that in the future, Continental may be forced to advertise its air fares in compliance not only with Federal law, but also in compliance with as many as 50 or more state and territorial regulatory regimes. There is a great potential for different and inconsistent regulatory schemes and confusion of the public. Continental also faces the possibility of suits in one or more state courts which would compel it to alter advertising which already complies with DOT's uniform standards for air fare advertisements.

7. In particular, Texas Attorney General Jim Mattox, a member of NAAG, has informed Continental through Stephen Gardner, his assistant attorney general, that legal action against Continental will be initiated unless Continental incorporates certain surcharges in its total advertised price for transatlantic air fares. See the attached true copy of Stephen Gardner's letter of November 14, 1988 to John Williams, General Counsel of Continental (Exhibit 1).

8. Attorney General Mattox specifically seeks to compel Continental to include in its published air fares and in its advertising the $3.00 international departure tax, the $10.00 immigration and customs fee, and the $10.00 security surcharge which Continental currently levies on transatlantic air travel. While the $3.00 international departure tax and the $10.00 immigration and customs fee are mandated by federal law and are assessed by all airlines in the transatlantic market, the security surcharge of $10.00 is levied only by certain U.S. flag carriers, including Continental, in connection with security services and other measures against the

possibility of terrorist attacks on American passengers and property during transatlantic flights.

9. Continental regularly advertises its rates, routes and services in newspapers that are published and circulated in Texas. Both in these advertisements and in Continental's other advertisements published in the United States, Continental has fully and completely disclosed the three transatlantic surcharges in its advertising, including the security surcharge imposed by Continental. As an example, attached hereto as Exhibit 2 is a true copy of a Continental advertisement which ran in the Houston Chronicle on January 15, 1989. The attached Exhibit 2 fully complies with all applicable federal laws, rules and regulations, including DOT rules and regulations. The advertisement of mandatory fees and surcharges separate and apart from the total advertised air fare is specifically permitted by DOT Orders 85-12-68, 88-3-25 and 88-8-2.

10. Because of the threat of litigation by NAAG and/or certain of its members, Continental has attempted to conform its advertising practices to the NAAG Guidelines, to the extent such Guidelines are not in direct conflict with DOT regulations. However, such direct conflicts clearly exist, and the need to reconcile the inconsistencies has dramatically complicated Continental's advertising program. For example, NAAG's Guidelines allow the advertisement of restricted fares on billboards with only the notation "significant restrictions apply." DOT's Federal regulations do not permit this practice, and in fact require a more detailed disclosure. NAAG's attempted promulgation of an inconsistent

Guideline has caused unnecessary difficulties with Continental's program of billboard advertising.

11. If Continental is forced to comply with the NAAG Guidelines regarding surcharges, competition in the airline industry will be impaired, rather than fostered. More specifically, Continental will face a competitive disadvantage against foreign flag carriers which do not assess a security surcharge, as Continental does. Continental already discloses in its advertising the existence of a separate $10.00 security surcharge, in full compliance with DOT Orders 85-12-68, 88-3-25 and 88-8-2. (See Exhibit 2.) Forcing Continental to go the further step of incorporating the $10.00 security surcharge in its stated air fares will make Continental appear to charge a higher air transport fare than its foreign counterparts. Thus, besides interfering with the exclusive jurisdiction of the DOT in air fare advertising and compelling Continental to comply with a complicated mix of conflicting rules and regulations, imposition of the NAAG Guidelines will also compel Continental to consider whether its assessment of a security surcharge will place it at a competitive disadvantage with respect to foreign-flag carriers.

12. If strict compliance with NAAG Guidelines is required, significantly less information will be advertised in the market place regarding Continental's system-wide rates. Already, compliance with NAAG's Guidelines has forced Continental to reduce the number of air fares quoted in its printed advertising featuring price listings for multiple destinations. Because of space restrictions and the NAAG Guidelines' type requirements, Continental's traditional 30-inch print advertisement

cannot accommodate a price listing of more than approximately 45 destinations. This represents a 25% decrease from the pre-Guideline advertisements, which listed approximately 60 destinations. As a further example of the adverse impact the NAAG Guidelines have had, Continental has been forced to cease the use of 10-second television and radio advertisements, as it is impossible to convey air fare information in that span of time with all of the NAAG required disclosures. If Continental is compelled to follow the NAAG Guidelines' requirements regarding surcharges, Continental in all probability will have to abandon the use of 30-second radio advertisements as well. Consequently, the NAAG Guidelines will significantly reduce both the amount and quality of information available in the highly competitive transatlantic airline market.

13. As noted above, Texas' Attorney General has advised Continental of his intent to compel Continental to regulate its advertising in conformity with his interpretation of the NAAG Guidelines. However, the Attorneys General of Utah and New Mexico have vigorously dissented from the enforcement guidelines which NAAG has announced. Thus, Continental and other similarly situated carriers face the possibility of having to conform to the requirements as many as 50 or more different state and territorial regulatory schemes, in addition to the already comprehensive federal scheme.

14. At all times during my employment with Continental (including before the NAAG Guidelines were announced), Continental's advertisements on their face have disclosed the fact that in addition to the air fare charged by

Continental, the consumer on a transatlantic flight would be required to pay a U.S. departure tax. Since the customs fee and the security surcharge have become effective, Continental has also plainly disclosed the existence of these charges in its advertisements containing transatlantic fare information.

15. With my staff's assistance, I have attempted to evaluate how Continental (and the public) would be impacted or injured if the NAAG Guidelines on surcharges are implemented. Continental would necessarily lose customers to foreign flag carriers and suffer a corresponding loss in revenue. Likewise, the public faces injury in the form of less information in the market upon which to base its decisions. While we are certain that there would be a decrease in revenue and a loss of customers, it is impossible to determine the extent of the injury to Continental. Revenue losses could vary tremendously in response to a terrorist incident, fluctuations in the U.S. dollar's exchange rate, commercial developments in our American and European destinations, an upturn or downturn in the economy, or a host of other variables.

[Signature and jurat omitted in printing.]

[Exhibit 1 to Exhibit C to Motion for Temporary Restraining Order]

[Letterhead of Texas Attorney General]

November 14, 1988

VIA FEDERAL EXPRESS

John Williams, Esq.
Assistant General Counsel
Continental Airlines
2929 Allen Parkway
Houston, Texas 77017

Re: Disclosure of fare surcharges in advertisements

Dear Mr. Williams:

I am writing on behalf of the States of California, Massachusetts, New York, Texas, and Washington to reaffirm the position of the states regarding fare surcharges in advertisements. It is the position of the states that any fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare. Failure to do so violates our respective state consumer protection laws.

Specific surcharges which must be included in the advertised fare are

- the $3.00 international departure fee,
- the $10.00 customs fee,
- the "security" surcharge (usually $10.00), and

- any fuel surcharge.

It is no defense to claim that the surcharges are disclosed elsewhere in the advertisement. The deception, and thus the violation of our laws, occurs when the advertisement states a specific amount for a fare which is not in fact the true cost because the surcharges have been factored out. This deception cannot be cured by a footnote or other separate reference.

The states do not wish to burden airlines unduly with respect to advertising their fares. Full disclosure in this instance is actually simpler – no footnote is required and there is therefore less "clutter" in the advertisement.

More importantly, our citizens – and your customers – will not be deceived by inaccurate information.

The states are aware that the United States Department of Transportation ("DOT") has taken the position that factoring out some surcharges is proper. In Orders 8-3-25 and 88-8-2, DOT has condemned fuel surcharges but has condoned the three international fare surcharges (departure, customs, and "security").

This position taken by DOT is contrary to its own existing regulation (14 CFR §399.84) which says, in relevant part:

> "[A]ny advertising or solicitation...for passenger air transportation...that states a price...[is] an unfair or deceptive practice, unless the price stated is the entire price to be paid by the customer...for such air transportation... ."

The states believe that DOT itself violated the law when it issued these orders. Accordingly, the states signing this letter, together with 22 other states, have sued DOT for its illegal actions. That case is now pending in the United States Court of Appeals for the District of Columbia Circuit in Washington, D.C. (Docket Nos. 88-1348 and 88-1682). It is scheduled for oral argument on January 23, 1989.

The states are also aware that certain members of the industry have voiced the opinion that state enforcement of our consumer protection laws has been preempted by the DOT. The states disagree. Regardless of whether DOT is willing to allow deceptive advertising, the states are not. Our analysis of the law of preemption in this area convinces us that the states are free to protect our citizens from deception by enforcing our state consumer protection laws. We believe that this position fully comports with the Administration's own policy on preemption as expressed in Executive Order 12612, issued on October 26, 1987.

We are, however, aware that the apparent attempt by DOT to contravene the law by allowing surcharges has possibly created an atmosphere of confusion in the industry. Airlines may believe that they only need to comply with the DOT position.

This is not the case. Airlines may comply with the laws of the states without conflicting with DOT policy, and accordingly they must do so. This letter has been sent to every airline which we have identified as deceiving the public through surcharge advertising. This is the final opportunity to cure your violation of the state laws.

This letter serves as formal notice of intent to sue as required by our respective state laws. If your airline deceptively advertises fares in the future, you will be subject to being sued without further notice or opportunity to cure.

To allow time to bring your advertising into compliance, we will not take action until after November 30. Any advertisement which appears prior to December 1 will not be the subject of legal action by the states signing this letter, *unless* a deceptive advertisement appears on or after December 1.

If you have any questions regarding the position stated in this letter, we encourage you to contact us for further discussions.

It is our desire that, having made our position clear, we may expect cooperation from all airlines in preventing future deception.

Very truly yours,

/s/STEPHEN GARDNER
Assistant Attorney General

[Exhibit 2 to Exhibit C to Motion for Temporary Restraining Order]

LONDON WEEKENDER PACKAGE
Air inclusive

$449

- Round trip airfare from Houston
- 3 nights hotel
- Continental breakfast daily
- Hotel service-charge and taxes

London Weekender package rates are per person/double occupancy and are valid through March 9, 1989. Rates do not include $3.00 U.S. departure tax, $10.00 security fee or $10.00 federal inspection fee. Space is limited and you must travel to London on Thursday or Friday, returning on Monday or Tuesday.

CONTINENTAL
Working to be your choice to the world.

For more information, call one of the fine agencies listed.

Klein Travel
Stuebner @ Louetta
376-5500

Ashford Memorial Travel
1035 Dairy Ashford
558-5777

Journey's Unlimited
4528 Beechnut
666-6934

Viking Travel
11 Greenway Plaza #606
621-9400

Woodforest Travel
455-8870

RiverR Travel
8705 S. Manon
392-0170

Utopia Travel
5444 Westheimer
621-1000

Travel Etc
5401 Bellaire
666-6100

Westchase Travel
12280 Westheimer #300
556-9017

Astrodome Travel
661-1933

All Seasons Travel
Galleria 622-8700
Northwest 880-0050

Sharpstown Travel
Open Sat. 10-5
995-1950

Exhibit 2

BEST AVAILABLE COPY

[Text of advertisement on preceding page.]

LONDON

LONDON WEEKENDER PACKAGE

Air inclusive

$449

- Round trip airfare from Houston
- 3 nights hotel
- Continental breakfast daily
- Hotel service-charge and taxes

London Weekender package rates are per person/double occupancy and are valid through March 9, 1989. Rates do not include $3.00 U.S. departure tax, $10.00 security fee or $10.00 federal inspection fee. Space is limited and you must travel to London on Thursday or Friday, returning on Monday or Tuesday.

CONTINENTAL

Working to be your choice to the world.

For more information, call one of the fine agencies listed:

Klein Travel
Stuebner @ Louetta
376-550

Woodforest Travel
455-8870

Westchase Travel
12280 Westheimer #300
556-9017

Ashford Memorial Travel
1035 Dairy Ashford
558-5777

RMR Travel
8705 S. Mason
392-0170

Journey's Unlimited
4528 Beechnut
666-6934

All Seasons Travel
Gallena 622-8700
Northwest 880-0050

Travel Etc.
5401 Bellaire
664-6100

Astrodome Travel
661-1933

Utopia Travel
5444 Westheimer
621-1000

Viking Travel
11 Greenway Plaza #606
621-9400

Sharpstown Travel
Open Sat. 10-6
995-1950

©1989 Continental Airlines, Inc.

[Exhibit D to
Motion for Temporary Restraining Order]

[Title omitted in printing.]

AFFIDAVIT OF BRUCE O'BRIEN

BEFORE ME, the undersigned authority, personally appeared Bruce O'Brien, who being by me duly sworn, deposes and states as follows:

1. My name is Bruce O'Brien. I am over the age of 21 years, have never been convicted of a crime, and have personal knowledge of all the facts and opinions contained herein.

2. I am employed by Trans World Airlines, Inc. ("TWA") as Staff Vice President - International Pricing. I have held this post since October 1986. Prior to that time, I was TWA's Director-International Pricing for approximately seven years. My responsibilities as Staff Vice Presiden-International Pricing include the preparation and dissemination of all TWA tariffs, as well as the filing of these tariffs with the U.S. government and with foreign governments.

3. Under applicable federal laws, TWA files tariffs with the U.S. Department of Transportation ("DOT") that describe its rates, fares, and services. DOT reviews these proposed tariffs and approves or disapproves them in a manner consistent with federal law.

4. TWA's tariffs set forth the rights and duties of both the airline and its passengers. Consistent with the requirements of the Code of Federal Regulations, these tariffs are available to the public for inspection. TWA's tariffs, or a detailed

summary of their contents, are also accessible to travel agents and the public through major U.S. computer reservation networks, including PARS (Passenger Advance Reservation System), Sabre, Apollo, and similar systems.

5. In conformity with federal regulations, the tariffs which TWA files and which are approved by DOT list separately the charges for air fare and any surcharges which may be applicable, such as the $10.00 security surcharge which TWA levies on transatlantic air travel.

[Signature and jurat omitted in printing.]

[Exhibit E to
Motion for Temporary Restraining Order]

[Title omitted in printing.]

AFFIDAVIT OF JOHN POWER

BEFORE ME, the undersigned authority, personally appeared John Power, who being by me duly sworn, deposes and states as follows:

1. My name is John Power. I am over the age of 21 years, have never been convicted of a crime, and, except as indicated, have personal knowledge of all the facts and opinions contained herein.

2. I have been employed by British Airways Plc as Senior Vice President - Marketing, North America, since September 1, 1986. In that capacity, I am the British Airways manager ultimately responsible for all sales and marketing operations in North America, including the setting of British Airways' fares, the development of promotions and advertising, and the determination of all marketing, planning and policies. I have been employed by British Airways in various locations and in various marketing and other capacities since 1965.

3. As Senior Vice President of British Airways, I have personal knowledge of British Airways' marketing activities and am generally familiar with other aspects of British Airways' operations in North America, including the regulatory framework in which British Airways operates in the United States.

4. British Airways is a company organized under the laws of the United Kingdom. It has its

principal place of business at Heathrow Airport in Hounslow, England, outside of London. British Airways is licensed by the Civil Aviation Authority ("CAA") in the United Kingdom to provide domestic and international air transportation in the United Kingdom.

5. British Airways is not permitted under U.S. law to provide any domestic U.S. air transportation. British Airways is defined under U.S. aviation laws as a "foreign air carrier" and is authorized to provide international air transportation to and from the United States only through the sponsorship of the U.K. government and only pursuant to an agreement between the governments of the United States and the United Kingdom generally known as "Bermuda 2."

6. Each British Airways flight between the U.S. and the U.K. is subject to regulation by both governments. As a British carrier, British Airways is extensively regulated by the CAA, without whose license we could not operate. To the extent British Airways provides international air transportation to and from other countries, including the United States, we must also comply with their aviation regulations. Because regulatory philosophies can differ and regulations can conflict, Bermuda 2 specifies the way in which each government will regulate carriers certified by the two countries to provide international air transportation between them.

7. Bermuda 2 contains detailed provisions specifying what services we can provide, what routes we can serve, what capacity we can provide, what fares we can charge and, in general, the manner in

which we can operate. Of special interest in light of the issue before the Court, Bermuda 2 contains detailed provisions on how tariffs are to be established and approved by the two governments and how conflicts between the governments on tariff issues are to be resolved.

8. In accordance with Bermuda 2, both the CAA and the U.S. Department of Transportation ("DOT") require that all carriers providing air transportation between the U.S. and the U.K. file tariffs specifying their fares and charges. All carriers are required, moreover, to make these tariffs available for public inspection and to charge passengers no more than the amounts specified in the tariffs. In accordance with these requirements, British Airways files tariffs with both the CAA and the DOT that specify the fares British Airways charges for international air transportation. The charges that we collect for the benefit of the governments (and I would emphasize that these charges are not collected for the benefit of British Airways), including the taxes and fees at issue in this proceeding, are either specified separately, in the case of the U.S. DOT, or not included in our tariff, in the case of the CAA. British Airways' U.S. tariff is explicit on this point:

"Any tax or other charge imposed by government authority and collectible from a passenger will be in addition to the published fares and charges. EXCEPTION: transit taxes at connecting points will be borne by carrier in case of scheduled overnight or other stops or through services."

A true and correct copy of the excerpt from the British Airways tariff filed with the DOT containing this rule is attached hereto as Exhibit 1.

9. The British Airways tariffs have been approved by both the U.K. and U.S. aviation authorities in accordance with the procedures set out in Bermuda 2. In accordance with government regulations, British Airways' tariffs are available for public inspection at each airport or other ticket office of British Airways, including those in Texas. In addition, British Airways publicizes its fares and charges through advertisements, including advertisements in local newspapers in Texas and other states. Until December 1988, British Airways publicized its fares in such advertisements in the same manner it did in its tariff, i.e., British Airways listed separately the fare it charged for air transportation and the taxes it collected for the benefit of the U.S. government. A true and correct copy of an example of such advertisements published last September and October in newspapers around the country, including the Dallas Morning News, Dallas Times-Herald, Fort Worth Star-Telegram, Houston Chronicle and Houston Post, is attached hereto as Exhibit 2. This advertisement shows separately the air fare British Airways charges pursuant to its filed tariff and the departure tax and customs fee British Airways collects for the U.S. government. This manner of showing fares and charges was expressly authorized by the DOT. Orders 85-12-68 (December 24, 1985) and 88-3-25 (March 10, 1988).

10. By letter dated November 14, 1988, British Airways was advised by Stephen Gardner, Assistant Attorney General of Texas, that the States of Texas, California, Massachusetts, New York and Washington would sue British Airways for violating state consumer protection laws if British Airways

continued to advertise fares and taxes separately in the manner specified in British Airways' tariff and approved by the CAA and DOT. A true and correct copy of Mr. Gardner's letter is attached hereto as Exhibit 3. By enforcing the guidelines promulgated by the National Association of Attorneys General, Texas and other states are attempting to require British Airways to publicize its fares and charges in a way directly contrary to the way in which U.K. and federal U.S. law permits, and indeed requires, British Airways to publish its fares, i.e, in the manner specified in its tariff.

11. Since early December 1988, British Airways has complied with the demands of Mr. Gardner either by refraining from price advertising or by including the government taxes in the figure listed for British Airways' fare. Although British Airways attracts customers through the quality of its overall service, either action may place British Airways at a significant competitive disadvantage in market segments that are price sensitive. If we refrain from price advertising, we will be unable to stimulate the increased traffic that would come from price-sensitive travelers who would be prompted to travel or to choose the U.K. as a destination by price advertising. If, on the other hand, British Airways does advertise prices but complies with the demands of Mr. Gardner, we will be at a competitive disadvantage for price sensitive travelers vis-a-vis other air carriers who exercise their rights to abide by the federal regulations and refuse to comply with the rules the states are attempting to enforce. Because our fare would appear to be higher than such airlines, when in fact it is the same or lower, we would lose many of those price-sensitive travelers we hope to reach with price advertising. We could not quantify

the revenues we would lose from such a competitive disadvantage, nor would there be any remedy available to us if we could quantify our losses.

12. In the long run, it is my opinion that the inhibitions placed on price advertising by the states could actually inhibit the availability of innovative or discount fares designed to attract the most price-sensitive travelers. Because not all airlines collect the same amounts in surcharges, those (which do not include British Airways) that collect more surcharges than others are likely to be reluctant to introduce new discount fares if they do not appear to be lower than their competition.

[Signature and jurat omitted in printing.]

[Exhibit 1 to Exhibit E to Motion for Temporary Restraining Order]

C.T.C.(A) NO. 306 ¶C.A.B. NO. 505

Airline Tariff Publishing Company
Agent International Passenger Rules
and Fares Tariff No. BA-1 Original Page BA-61

Rule SECTION I - GENERAL RULES

40 TAXES

Any tax or other charge imposed by government authority and collectible from a passenger will be in addition to the published fares and charges.
EXCEPTION: Transit taxes at connecting points will be borne by carrier in case of scheduled overnight or other stops on through services.

45 ADMINISTRATIVE FORMALITIES, PASSPORTS, VISAS AND TOURIST CARDS

(A) COMPLIANCE WITH REGULATIONS

The passenger shall comply with all laws regulations, orders, demands or travel requirements of countries to be flown from, into or over, and with all rules, regulations and instructions of BA. BA shall not be liable for any aid or information given by any agent or employee of BA to any passenger in connection with obtaining necessary documents or complying with such

laws, regulations, orders, demands, requirements or instructions, whether given orally or in writing; or for the consequences to any passenger resulting from his failure to obtain such documents or to comply with such laws, regulations, orders, demands, requirements and instructions.

(B) PASSPORTS AND VISAS

(1) The passenger must present all exit, entry and other documents required by laws, regulations, orders, demands, or requirements of the countries concerned. BA will refuse carriage to any passenger who has not complied with applicable laws, regulations, orders, demands, or requirements, or whose documents are not complete. BA is not liable to the passenger for loss or expense due to the passenger's failure to comply with this provision.

(2) Subject to applicable laws and regulations, the passenger agrees to pay the applicable fare whenever BA on government order is required to return the passenger to his point of origin or elsewhere due to the passenger's inadmissibility into a country, whether of transit or of destination. BA will apply to the

payment of such fares any funds paid by the passenger to BA for unused carriage or any funds of the passenger in the possession of BA. The fare collected for carriage to the point of refusal or deportation will not be refunded by BA.

(C) CUSTOMS INSPECTION

If required, the passenger must attend inspection of his baggage, checked or unchecked by customs or other government officials. BA accepts no responsibility toward the passenger if the latter fails to observe this condition. If damage is caused to BA because of the passenger's failure to observe this condition, the passenger shall indemnify BA therefor.

(D) GOVERNMENT REGULATION

No liability shall attach to BA if BA in good faith determines that what it understands to be applicable law, government regulation, demand, or other requirement requires that it refuse and it does refuse to carry a passenger.

For the explanation of abbreviations, reference marks and symbols used but unexplained hereon, see Pages BA-21 through BA-30

Issued: May 29, 1987; Effective: June 1, 1987; Printed in the USA

[Exhibit 2 to Exhibit E to Motion for Temporary Restraining Order]

[INSERT BRITISH AIRWAYS AD]

Exhibit 2

BEST AVAILABLE COPY

[Text of advertisement on preceding page.]

Superb
British fare,
now available
in Dallas/
Ft. Worth.
$438 Round-trip

Beginning October 1, you can travel non-stop to London on British Airways for just $438 round-trip. Which means you can enjoy the best of British hospitality, gracious service and classic cuisine at an unprecedented low price.

Superb British fare. Now available at a fairly unbelievable price.

For reservations call your travel agent or 1-800-AIRWAYS.

BRITISH AIRWAYS

The world's favourite airline.•

TERMS & CONDITIONS: Fare Code:QLANS. This fare available from Dallas/Ft. Worth to London on direct British Airways flights only. Travel is permitted: Eastbound Sun.-Wed., Westbound Mon.-Thurs. only. Minimum stay: 7 days. Maximum stay: 21 days. All travel must commence during the period Oct. 1, 1988 through Dec. 7, 1988 and be completed by Dec. 15. 1988. Reservations, payment and ticketing must be completed not later than 45 days prior to date of departure and within 48 hours of reservation, and are non-refundable. For tickets purchased on or before Sept. 20, 1988, advance purchase will be waived. Fares and schedules subject to change without notice. $13.00 U.S. departure tax and customs

fee not included. Changes not permitted. Limited availability. Offer not valid with children's, infant's, trade or industry discounts, or in combination with any other promotion or special offer. Subject to gov't approval.

British Airways
Job No.: BAW-BAC-88-3046DF
Title: 5 col. x 14"B/W
Publications: Various Texas Newspapers
Issue: 9/16/88
This Advertisement Prepared By
Becker Spielvogel Bates Inc.

[Exhibit 3 to Exhibit E to Motion for Temporary Restraining Order]

[Letterhead of Texas Attorney General]

November 14, 1988

VIA FEDERAL EXPRESS

Karen Crider, Esq.
General Counsel
British Airways
75-20 Astoria Boulevard
Jackson Heights, NY 11370

Re: Disclosure of fare surcharges in advertisements

Dear Ms. Crider:

I am writing on behalf of the States of California, Massachusetts, New York, Texas, and Washington to reaffirm the position of the states regarding fare surcharges in advertisements. It is the position of the states that any fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare. Failure to do so violates our respective state consumer protection laws.

Specific surcharges which must be included in the advertised fare are

- the $3.00 international departure fee,
- the $10.00 customs fee,
- the "security" surcharge (usually $10.00), and

- any fuel surcharge.

It is no defense to claim that the surcharges are disclosed elsewhere in the advertisement. The deception, and thus the violation of our laws, occurs when the advertisement states a specific amount for a fare which is not in fact the true cost because the surcharges have been factored out. This deception cannot be cured by a footnote or other separate reference.

The states do not wish to burden airlines unduly with respect to advertising their fares. Full disclosure in this instance is actually simpler – no footnote is required and there is therefore less "clutter" in the advertisement.

More importantly, our citizens – and your customers – will not be deceived by inaccurate information.

The states are aware that the United States Department of Transportation ("DOT") has taken the position that factoring out some surcharges is proper. In Orders 8-3-25 and 88-8-2, DOT has condemned fuel surcharges but has condoned the three international fare surcharges (departure, customs, and "security").

This position taken by DOT is contrary to its own existing regulation (14 CFR §399.84) which says, in relevant part:

> "[A]ny advertising or solicitation...for passenger air transportation...that states a price...[is] an unfair or deceptive practice, unless the price stated is the entire price to be paid by the customer...for such air transportation... ."

The states believe that DOT itself violated the law when it issued these orders. Accordingly, the states signing this letter, together with 22 other states, have sued DOT for its illegal actions. That case is now pending in the United States Court of Appeals for the District of Columbia Circuit in Washington, D.C. (Docket Nos. 88-1348 and 88-1682). It is scheduled for oral argument on January 23, 1989.

The states are also aware that certain members of the industry have voiced the opinion that state enforcement of our consumer protection laws has been preempted by the DOT. The states disagree. Regardless of whether DOT is willing to allow deceptive advertising, the states are not. Our analysis of the law of preemption in this area convinces us that the states are free to protect our citizens from deception by enforcing our state consumer protection laws. We believe that this position fully comports with the Administration's own policy on preemption as expressed in Executive Order 12612, issued on October 26, 1987.

We are, however, aware that the apparent attempt by DOT to contravene the law by allowing surcharges has possibly created an atmosphere of confusion in the industry. Airlines may believe that they only need to comply with the DOT position.

This is not the case. Airlines may comply with the laws of the states without conflicting with DOT policy, and accordingly they must do so. This letter has been sent to every airline which we have identified as deceiving the public through surcharge

advertising. This is the final opportunity to cure your violation of the state laws.

This letter serves as formal notice of intent to sue as required by our respective state laws. If your airline deceptively advertises fares in the future, you will be subject to being sued without further notice or opportunity to cure.

To allow time to bring your advertising into compliance, we will not take action until after November 30. Any advertisement which appears prior to December 1 will not be the subject of legal action by the states signing this letter, *unless* a deceptive advertisement appears on or after December 1.

If you have any questions regarding the position stated in this letter, we encourage you to contact us for further discussions.

It is our desire that, having made our position clear, we may expect cooperation from all airlines in preventing future deception.

Very truly yours,

/s/STEPHEN GARDNER
Assistant Attorney General

[Exhibit F to
Motion for Temporary Restraining Order]

[Title omitted in printing.]

AFFIDAVIT OF JEAN ZELKOVICH

BEFORE ME, the undersigned authority, personally appeared Jean Zelkovich, who being by me duly sworn, deposes and states as follows:

1. My name is Jean Zelkovich. I am over the age of 21 years, have never been convicted of a crime, and have personal knowledge of all the facts and opinions contained herein.

2. I am employed by Continental Airlines, Inc. ("Continental") as Director-International Pricing. I have held this position since April 1987. Prior to that time, I was Manager-International Pricing for Continental from July 1985 to April 1987. My duties as Director-International Pricing include responsibility for application, filing, and maintenance of international tariffs, both with the U.S. Government and with foreign governments.

3. Under applicable federal laws, Continental is required to file tariffs with the U.S. Department of Transportation ("DOT") that describe its rates, fares, and services for all transportation that it provides. DOT reviews these proposed tariffs and approves or disapproves them in a manner consistent with federal law.

4. The tariffs which Continental file with DOT set forth the rights and duties of both the carrier and the passengers. As required by the Code of Federal Regulations, these tariffs are available to the public for inspection.

5. In conformity with federal regulations, the tariffs which Continental files and which are approved by DOT list separately the charges for air fare and any surcharges which may be applicable, such as the $10.00 security surcharge which Continental levies on transatlantic air travel.

6. The General Rules section of Continental's tariffs includes the following language in Rule 40: "Any tax or other charge imposed by government authority and collectable from a passenger will be in addition to the published fares and charges . . .." A true copy of Rule 40 is attached as Exhibit 1 to this Affidavit. Pursuant to this rule, the U.S. departure tax and immigration and customs fees which are imposed by U.S. law and collected by Continental from its transatlantic passengers are not included in the published fares and charges in Continental's tariffs.

[Signature and jurat omitted in printing.]

[Exhibit 1 to Exhibit F to Motion for Temporary Restraining Order]

C.T.C.(A) NO. 210 ¶C.A.B. NO. 376

Airline Tariff Publishing
Company, Agent International
Passenger
Rules and Fares — 14th Revised Page 50-A
Tariff No. IPR-2 — Cancels 15th Revised Page 50-A

Rule SECTION I - GENERAL RULES

40 TAXES

Any tax or other charge imposed by government authority and collectible from a passenger will be in addition to the published fares and charges, except that transit taxes at connecting points may be absorbed under the conditions indicated in Rule 35, paragraph (A)(2)(a) and (b), provided also that such transit tax is not applicable to such through service.

45 ADMINISTRATIVE FORMALITIES, PASSPORTS, VISAS AND TOURIST CARDS

(A) COMPLIANCE WITH REGULATIONS

The passenger shall comply with all laws regulations, orders, demands or travel requirements of countries to be flown from, into or over, and with all rules, regulations and instructions of carrier. Carrier shall not be liable for any aid or information given or complying with such laws, or otherwise, or for the

consequences to any passenger resulting from his failure to obtain such documents or to comply with such laws, regulations, orders, demands, requirements, or instructions.

(B) PASSPORTS AND VISAS

(1) Each passenger desiring transportation across any international boundary will be responsible for obtaining all necessary travel documents and for complying with all government travel requirements. The passenger must present all exit, entry and other documents required by the laws, and, unless applicable laws provide otherwise, shall indemnify the carrier for any loss, damage, or expense suffered or incurred by such carrier by reason of such passenger's failure to do so. Carrier is not liable to the passenger for loss or expense due to the passenger's failure to comply with this provision. Carrier reserves the right to refuse carriage to any passenger who has not complied with applicable laws, regulations, orders, demands, or requirements or whose documents are not complete. No carrier shall be liable for any aid or information given by any agent or employee of

such carrier to any passenger in connection with obtaining such documents or complying with such laws, whether given orally or in writing or otherwise.

(2) Subject to applicable laws and regulations, the passenger agrees to pay the applicable fare whenever carrier, on government order, is required to return a passenger to his point of origin or elsewhere due to the passenger's inadmissibility into or deportation from a country, whether of transit or of destination. The fare applicable will be the fare that would have been applicable had the original ticket designated the revised destination on the new ticket. Any difference between the fare so applicable and the fare paid by the passenger will be collected from or refunded to the passenger as the case may be. Carrier may apply to the payment of such fares any funds paid by the passenger to carrier for unused carriage, or any funds of the passenger in the possession of carrier. The fare collected for carriage to the point of refusal or deportation will not be refunded by the carrier, unless the law of such country requires that such fare be refunded.

(3) PASSENGER TRANSITING WITHOUT VISA (TRWOV) - SERVICE CHARGE (Applicable to AC only)

(a) A passenger transiting, without a visa, a point(s) within a country requiring a visa for lawful entry, will be assessed, by AC, a Service Charge of U.S. Dollars $25.00 (Canadian Dollars $30.00) when AC is the carrier providing such passenger with transportation to such point(s).

NOTE: This Service Charge will be assessed either when AC issues/reissues the passenger's ticket or when passenger check-ins for flight.

†(C)(b) (Applicable to PA only A citizen/national/passport holder of the following countries; Dominican Republic, Haiti, the Caribbean Area excluding Bermuda - (applicable to travel commencing on/after February 15, 1988), transiting, without a visa, a point(s) within a country requiring a visa for lawful

entry, will be assessed, by PA, a service charge of USD 25.00 when PA is the carrier providing such passenger with transportation to such point(s).

NOTE: This service charge will be assessed either when PA issues/reissues the passenger's ticket or when passenger checks-in for flight.

(C) CUSTOMS INSPECTION

If required, the passenger must attend inspection of his baggage, checked or unchecked, by customs or other government officials. Carrier accepts no responsibility toward the passenger if the latter fails to observe this condition. If damage or caused to carrier because of the passenger's failure to observe this condition, the passenger shall indemnify carrier therefor.

(D) GOVERNMENT REGULATION

No liability shall attach to carrier if carrier in good faith determines that what it understands to be applicable law, government regulation, demand, order or requirement, requires that it refuse and it does refuse to carry a passenger.

For unexplained abbreviations, reference marks and symbols, see Pages 16-26.

ISSUED: February 5, 1988 EFFECTIVE: April 5, 1988

(Except as Noted)

(Printed in the U.S.A.)

+-Effective February 6, 1988 (except 2/from Canada) and issued on one (1) day(s) notice under D.O.T. Special Tariff Permission No. 53320.

Correction No. 80529

[Exhibit G to
Motion for Temporary Restraining Order]

[Title omitted in printing.]

AFFIDAVIT OF JOHN WILLIAMS

BEFORE ME, the undersigned authority, personally appeared John Williams, who being by me duly sworn, deposes and states as follows:

1. My name is John Williams. I am over the age of 21 years, have never been convicted of a crime, and have personal knowledge of all the facts and opinions contained herein.

2. I am the General Counsel for Continental Airlines, Inc. ("Continental"). I have held this position since October, 1981. Prior to that time I was General Counsel of Texas International Airlines. I am generally familiar with the federal regulatory framework in which major airlines determine and publish their air fares for passenger travel.

3. In 1987 and 1988, the National Association of Attorneys General ("NAAG") issued a set of guidelines which purported to represent its members' interpretations of their various state consumer protection laws, insofar as they pertained to the advertisement of commercial passenger air fares ("Guidelines"). NAAG provided Continental with a copy of these Guidelines. Continental duly noted its objections to the Guidelines, and in particular objected that the Guidelines represented an attempt to regulate an area that was already preempted by a comprehensive federal regulatory scheme.

4. On or about November 14, 1988, I received a telephone call from Stephen Gardner, the Assistant Attorney General of the State of Texas. Mr. Gardner informed me in that telephone conversation that in spite of Continental's objections, his office would initiate legal proceedings against Continental if it did not immediately comply with the Guidelines. Specifically, Mr. Gardner alleged that Continental was violating that portion of the NAAG Guidelines which purported to require the inclusion of certain surcharges in Continental's total advertised air fare for transatlantic flights (e.g., the $3.00 departure tax, the $10.00 customs and immigration fee, and the $10.00 security surcharge assessed by Continental). Continental has consistently advertised its transatlantic air fares by disclosing these additional fees and surcharges separately from the cost of the air fare itself, in a manner which has been expressly approved by the U.S. Department of Transportation (DOT) and its predecessor agency, the Civil Aeronautics Board (CAB). Despite the apparent inconsistencies and conflicts between the NAAG Guidelines (as interpreted by the Attorney General of Texas) and DOT/CAB's comprehensive federal regulatory scheme, Mr. Gardner insisted that his office would initiate legal proceedings against Continental if it continued to advertise its transatlantic air fares in this manner after December 1, 1988.

5. My office subsequently received a letter from Mr. Gardner, dated November 14, 1988. A true copy of the letter is attached as Exhibit 1 to this Affidavit. Mr. Gardner repeated his threats of litigation against Continental in this correspondence.

6. On at least three occasions since the receipt of Exhibit 1, I have had telephone discussions with Mr. Gardner in which he has emphasized further the Attorney General's intent to institute legal proceedings against Continental, allegedly because of its continued violations of the NAAG Guidelines.

[Signature and jurat omitted in printing.]

[Exhibit 1 to Exhibit G to Motion for Temporary Restraining Order]

[Letterhead of Texas Attorney General]

November 14, 1988

VIA FEDERAL EXPRESS

John Williams, Esq.
Assistant General Counsel
Continental Airlines
2929 Allen Parkway
Houston, Texas 77017

Re: Disclosure of fare surcharges in advertisements

Dear Mr. Williams:

I am writing on behalf of the States of California, Massachusetts, New York, Texas, and Washington to reaffirm the position of the states regarding fare surcharges in advertisements. It is the position of the states that any fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare. Failure to do so violates our respective state consumer protection laws.

Specific surcharges which must be included in the advertised fare are

- the $3.00 international departure fee,
- the $10.00 customs fee,
- the "security" surcharge (usually $10.00), and

- any fuel surcharge.

It is no defense to claim that the surcharges are disclosed elsewhere in the advertisement. The deception, and thus the violation of our laws, occurs when the advertisement states a specific amount for a fare which is not in fact the true cost because the surcharges have been factored out. This deception cannot be cured by a footnote or other separate reference.

The states do not wish to burden airlines unduly with respect to advertising their fares. Full disclosure in this instance is actually simpler – no footnote is required and there is therefore less "clutter" in the advertisement.

More importantly, our citizens – and your customers – will not be deceived by inaccurate information.

The states are aware that the United States Department of Transportation ("DOT") has taken the position that factoring out some surcharges is proper. In Orders 8-3-25 and 88-8-2, DOT has condemned fuel surcharges but has condoned the three international fare surcharges (departure, customs, and "security").

This position taken by DOT is contrary to its own existing regulation (14 CFR §399.84) which says, in relevant part:

> "[A]ny advertising or solicitation...for passenger air transportation...that states a price...[is] an unfair or deceptive practice, unless the price stated is the entire price to be paid by

the customer...for such air transportation... ."

The states believe that DOT itself violated the law when it issued these orders. Accordingly, the states signing this letter, together with 22 other states, have sued DOT for its illegal actions. That case is now pending in the United States Court of Appeals for the District of Columbia Circuit in Washington, D.C. (Docket Nos. 88-1348 and 88-1682). It is scheduled for oral argument on January 23, 1989.

The states are also aware that certain members of the industry have voiced the opinion that state enforcement of our consumer protection laws has been preempted by the DOT. The states disagree. Regardless of whether DOT is willing to allow deceptive advertising, the states are not. Our analysis of the law of preemption in this area convinces us that the states are free to protect our citizens from deception by enforcing our state consumer protection laws. We believe that this position fully comports with the Administration's own policy on preemption as expressed in Executive Order 12612, issued on October 26, 1987.

We are, however, aware that the apparent attempt by DOT to contravene the law by allowing surcharges has possibly created an atmosphere of confusion in the industry. Airlines may believe that they only need to comply with the DOT position.

This is not the case. Airlines may comply with the laws of the states without conflicting with DOT policy, and accordingly they must do so. This letter has been sent to every airline which we have identified as deceiving the public through surcharge

advertising. This is the final opportunity to cure your violation of the state laws.

This letter serves as formal notice of intent to sue as required by our respective state laws. If your airline deceptively advertises fares in the future, you will be subject to being sued without further notice or opportunity to cure.

To allow time to bring your advertising into compliance, we will not take action until after November 30. Any advertisement which appears prior to December 1 will not be the subject of legal action by the states signing this letter, *unless* a deceptive advertisement appears on or after December 1.

If you have any questions regarding the position stated in this letter, we encourage you to contact us for further discussions.

It is our desire that, having made our position clear, we may expect cooperation from all airlines in preventing future deception.

Very truly yours,

/s/STEPHEN GARDNER
Assistant Attorney General

[Exhibit H to Motion for Temporary Restraining Order]

IN THE UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

THE STATES OF ALASKA, ET AL.,

PETITIONERS,

AGAINST NUMBER 88-1348

UNITED STATES DEPARTMENT OF TRANSPORTATION and JIM BURNLEY, Secretary of Transportation,

RESPONDENTS.

AFFIDAVIT OF JIM MATTOX
ATTORNEY GENERAL OF TEXAS

STATE OF TEXAS
COUNTY OF TRAVIS

Before me the undersigned notary public on this day personally appeared Jim Mattox, known to me, who, being first duly sworn according to oath, stated as follows:

1. My name is Jim Mattox. I am fully competent in all respects to make this affidavit. I have personal knowledge of the facts stated in this affidavit, and they are true and correct. I have been the Attorney General for the State of Texas since 1983. Before that, I served as a member of the United States Congress from 1976 to 1982.

2. As Attorney General, I am a member of the National Association of Attorneys General

("NAAG"), which is an association of all state and territorial attorneys general. NAAG was founded in 1907 to provide a forum for the exchange of information and experience among the chief legal officers of the states and territories, to foster interstate cooperation on legal and law enforcement issues, and to conduct policy research and analysis of issues pertaining to the states and territories.

3. In June, 1987, as the result of a resolution which I sponsored (together with the three other attorneys general), NAAG directed the appointment of a Task Force of states to study the advertising and marketing practices of airline industry in the United States. In addition to the required study, the Task Force was directed to determine the nature and extent of existing unfair and deceptive airlines practices and to report a recommended course of action to NAAG at its meeting in December 1987.

4. The Task Force study was prompted by a dramatic increase of consumer complaints, received by my office and offices of other attorneys general, involving unfair and deceptive advertising and marketing practices by major airlines.

5. In August 1987, the Task Force held extensive meeting with representatives from the major airlines. The participants from these airlines included high-level executives, general counsel, managers of advertising and marketing departments, and managers of customer service and relations departments. During these meetings, exhaustive discussions were had regarding each airline's current advertising practices. Although there were numerous differences among the general operations

of each airline, many common responses emerged in response to the Task Force's examination. Many airlines stated candidly that their advertising and marketing practices were dictated by the practices of their competition. Moreover, they indicated a willingness to modify their practices as long as each airline did the same, in order to avoid any competitive disadvantages.

6. In December 1987, the Task Force presented its report and recommendations to NAAG at its winter meeting. On December 12, 1988, the members of NAAG voted overwhelmingly to adopt Guidelines proposed by the Task Force. The Guidelines were not an attempt at rulemaking, but rather, were intended to be a restatement of what is currently illegal under the laws of the various states, specifically applied to the practices of the airline industry.

7. The Guideline relevant to the subject of this case is Guideline 2.5 – "Surcharges." That Guideline says:

> Any fuel tax, or other surcharge to a fare must be included in the total advertised price of the fare.

It was, and remains, my opinion as chief legal officer of the State of Texas that this Guideline correctly summarizes the law of the State of Texas, as reflected in the Texas Deceptive Trade Practices Act, TEX. BUS. & COM. CODE §17.46 *et seq.*

8. The Guidelines took effect on January 15, 1988. On the whole, the nation's airlines complied with the principles set forth in the Guidelines. However, it soon became apparent that several airlines were not following Guideline 2.5, and were

failing to include in international fares a $23 surcharge, composed the three parts: $10 security surcharge, $3 international departure tax, and $10 custom fee. The latter two charges were forms of tax assessed by the United States government. The "security charge" is, as far as we can determine, not based on any governmental tax, but rather created out of whole cloth and adopted as an industry standard of deception.

9. Because of these airlines' apparently willful disregard of the Guidelines, and therefore the laws of the several states, my office (together with 6 other attorneys general) sent the major airlines a memorandum dated February 3, 1988, detailing the need to comply with Guideline 2.5. A copy of that memorandum is attached hereto as Exhibit A.

10. In direct response to that memorandum, the General Counsel of the Department of Transportation ("DOT"), Wayne Vance, wrote to me on March 2, 1988. A similar letter went to my fellow attorneys general who were on the February 6 memorandum. A copy of the letter is attached hereto as Exhibit B.

11. In essence, Mr. Vance's letter says that DOT's rule allows separate disclosure of mandatory fees, surcharges, and service charges, citing a 1985 order by DOT (Order 85-12-68) which did indeed allow separate statement of the $3 international departure tax (but no other charge).

12. In his letter, Mr. Vance expressed his opinion that the states were preempted from acting to protect consumers, when the DOT had already taken some form of action. He specifically said that the attorneys general were preempted in their

attempt to require airlines to include surcharges in the fare price quoted.

13. He concluded his letter with a threat to sue the states to prevent our enforcing our own state laws, as reflected in the Guidelines.

14. On March 9, 1988, I wrote to Mr. Vance to respond to his March 2 letter to myself and on behalf of four other attorneys general. My letter is attached as Exhibit C. It reiterates the position of the attorneys general that our actions were not preempted. It also points out to Mr. Vance that our Guideline 2.5 was in full compliance with the actual DOT regulation* and only conflicted to a slight degree with the 1985 Order 85-12-68 (as to the $3 charge).

15. In response to Mr. Vance's request in his March 2 letter for a meeting with the attorneys general, a number of other attorneys general and I met with Mr. Vance and the other DOT staff members in Washington, D.C. on March 14, 1988. During that meeting we discussed in detail the intentions of NAAG in adopting the Guidelines and the intentions of the individual attorneys general to require compliance with our own state laws, as reflected by the Guidelines. The discussion focussed in significant part on Guideline 2.5, and whether or not we were preempted by DOT action to date. We

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* 14 CFR 399.84, enacted by the old Civil Aeronautics Board before it was abolished but now enforced by DOT, provides that it is an unfair or deceptive practice to state a price for air transportation "unless the price stated is the entire price to be paid by the customer to the air carrier, or agent, for such air transportation..."

expressed again our belief that the 1985 Order 85-12-68 certainly did not serve to preempt us.

16. Unbeknownst to the attorneys general at the time, DOT had already quietly adopted the Order made the basis of this action (Order 88-3-25), attached hereto as Exhibit D), four days before our meeting with Mr. Vance and his colleagues. Neither Mr. Vance nor any other staff member then present advised us of the new order, and in my opinion in fact intentionally misled us by failing to disclose that DOT had just taken action that directly related to the matters then being discussed. We subsequently learned of the existence of the Order through other sources, and were never advised by DOT that it had taken this action.

17. It is my opinion that DOT intentionally acted in the dead of the night and with no proper process whatsoever in issuing Order 88-3-25, in an effort to bolster its position that the attorneys general of this country cannot act to protect their citizens from false advertising by the airlines.

18. After the Guidelines became effective and after we sent the airlines the February 3 memorandum (Exhibit A), there were a marked improvement in fare advertisements – surcharges were included in the quoted fare. Since Order 88-3-25 was issued by DOT, we have seen a resumption of advertisements which quote the fare without the $23 surcharge.

19. Inclusion of the surcharges does not impose any additional cost or trouble on the airlines. It is merely a matter a quoting a fare as, for example, $592 rather than 569. It is my opinion that DOT's secretive action encourages the airlines to quote

deceptively and artificially low fares, a practice which is illegal under the laws of Texas and other states.

[Signature and jurat omitted in printing.]

[Exhibit A to Exhibit H to Motion for Temporary Restraining Order]

MEMORANDUM

TO: Airlines and other interested parties

FROM: Attorneys General of Colorado, Kansas, Massachusetts, Missouri, New York, Texas, and Wisconsin

DATE: February 3, 1988

RE: Failure to include surcharges for international departure tax, customs and immigration fee, and security costs in primary fare quote

Violation of state deceptive advertising and trade practice laws

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Recently, it has come to our attention that although most airlines are making a concerted effort to bring their advertisements into compliance with the standards delineated in the National Association of Attorneys General ("NAAG") guidelines for fare advertising, many carriers are still factoring $23 out of the price advertised for international flights. This $23 "surcharge" allegedly represents a $3 departure tax, a $10 customs and immigration fee, and a $10 "security surcharge" (i.e., the increase in the airlines' cost for security). It is alluded to only in the footnote of print advertisements and is not included in broadcast commercials at all.

Guideline 2.5 of the NAAG guidelines states:

> Any fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare.

As the commentary to this guideline noted, there are sound reasons for this requirement. Last year some carriers attempted to pass along an increase in the cost of fuel as a surcharge separated out from the advertised fare. The potential for abuse if this type of practice is permitted is obvious. Carriers would be free to make their airfares appear lower simply by separating out any part of the price from the advertised fare and including a surcharge in a footnote. This practice with respect to fuel surcharges appears to have ended but the practice of excluding departure tax, customs and immigration fees, and security costs continues.

Whether the hidden charge is for fuel, governmental taxes or fees, or security costs the problem remains the same--the price advertised is not the actual cost of the product and the consumer who responds to the advertised price is misled.

The airline traveller, particularly the infrequent traveller, perceives that a quoted fare includes the entire cost of the ticket, without any later additions. Accordingly, failure to include the departure tax, customs and immigration fees, and security charges has the tendency and capacity to deceive the consumer as to the actual cost of the ticket. Additionally, because some airlines already include these types of surcharges in their advertised round-trip fares, the failure of other airlines to do the same promotes unfair competition in the industry.

The purpose of this memorandum is to clarify for the industry as a whole that, in the opinion of the states signing this memorandum, the failure to include any non-optional costs in the advertised price is a violation of our respective state laws on deceptive advertising and trade practices. In an effort to continue the spirit of cooperation with which the states and the airlines have approached this matter, we elected to send this advisory memorandum before initiating any immediate enforcement actions against specific carriers.

A list of the assistant attorneys general working on this matter is attached for your reference. Please feel free to contact any of them if you have a question or need clarification.

We hope that protracted litigation over this issue will not be necessary and that airlines will discontinue the practice of excluding these surcharges from the advertised price immediately. We ask each airline receiving this memorandum to confirm its intentions with respect to this matter in writing. Please respond by no later than February 10, and direct your letter to:

Stephen Gardner
Assistant Attorney General
714 Jackson Street, Suite 700
Dallas, Texas 75202

This memorandum is being provided to various copy acceptance directors in the media, for assistance in deciding whether to accept specific advertisements.

Thank you for your attention to this matter.

[Exhibit B to Exhibit H to Motion for Temporary Restraining Order]

[Letterhead of U.S. Department of Transportation]

March 2, 1988

Mr. Jim Mattox
Attorney General
P.O. Box 12548
Capitol Station
Austin, Texas 78711-2548

Dear Mr. Mattox:

A recent memorandum from seven Attorneys General to all airlines and interested parties, signed by the Attorneys General of New York, Massachusetts, Kansas, Texas, Colorado, Missouri, and Wisconsin, requests compliance with the section on full price advertising of the Guidelines of the National Association of Attorneys General (NAAG) for air transportation advertising. In addition, we understand that some Attorneys General have contacted airlines to enforce the section on roundtrip pricing of the Guidelines. Both of these matters are clearly preempted by Federal law. The State and Federal governments share the goal of ensuring clear dissemination of airline price information. In our view, however, Congress has made clear that these efforts must be consistent with the mandate of the Airline Deregulation Act to encourage price competition.

The memorandum of the Attorneys General requests that airlines not just include somewhere in the advertisement the amount of mandatory fees, surcharges, and service charges, but instead that they

state a full ticket price in the advertisement that includes all such charges. The Department's rule allows advertisements to list separately the ticket price from other charges. The NAAG Guidelines further require that for fares advertised on a one-way basis that are available only through a roundtrip purchase, the roundtrip purchase price also be listed. The Department's rule does not require the display of the roundtrip fare so long as the advertisement is clear on the roundtrip conditions. Under sections 204 and 411 of the Federal Aviation Act, the Civil Aeronautics Board (CAB), after notice and public comment, adopted a rule (14 CFR 399.84) that requires full price advertising for all components of the advertised air transportation. In consistent interpretations by this Department since assuming jurisdiction from the CAB for this rule, we have specifically permitted the type of advertising to which the Attorneys General object. (*See, e.g.*, Order 85-12-68 (enclosed). By adopting this rule and issuing these interpretations, the Federal government has preempted this aspect of State pricing advertising regulation.

In my opinion, the States may not regulate the advertising of air fares in this manner. Where there is actual conflict with a Federal rule, where there is an irreconcilable difference between the Federal rules and the State provision, or where the State regulation will be an obstacle to the Federal policy in the area, the Federal regulation takes precedence. See *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 159(1982).

Also, the United States has entered into air services agreements with more than 80 countries that include detailed provisions on prices, as well as governmental or other authority user charges.

Negotiations with foreign countries about these prices and charges and their advertisement are frequent. In this respect, we consider State advertising regulation in conflict with that of the Federal government to be preempted when the action "prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign governments." *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434,451 (1979). Further, Congress has required that user fees for Federal immigration services be separately listed on the ticket (Pub. L. 99-372). This legislation is consistent with our price advertising rule. For these reasons, I believe that the attempt by the Attorneys General to specify how the airlines construct their fare listings, where the Federal government has already so specified, is preempted.

In view of the above, I am asking you and the other Attorneys General not to take further action in this matter that could lead to our being opposing litigants rather than partners without thorough discussion at both State and Federal levels. In this connection, my staff and I would be glad to attend your upcoming NAAG meeting in Washington next month to share our views and to meet with you prior to the initiation of any other State action that could potentially be preempted. If threats to enforce the particular sections of the Guidelines continue, we will be forced to consider taking formal legal action to prevent their enforcement. I am confident that this result can be avoided through constructive and cooperative discussion.

Sincerely,

/s/B. Wayne Vance
General Counsel

Enclosure

cc: Christopher Ames
Deputy Attorney General of
California

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 24th day of December, 1985

Request of the Air Transport Association of America for an exemption from 14 CFR 399.84	Docket 43585
Petition of Balair, AG, et al for emergency rulemaking and 399.80 and 399.84	Docket 43596

ORDER GRANTING EXEMPTION

On November 14, 1985, the Air Transport Association of America (ATA), on behalf of its members, filed a request for an exemption from 14 CFR 399.84, which states the Department of Transportation's policy with respect to price advertising. That section declares that any advertising of flights, tours, or component of tours must state the entire price of the flight, tour, or tour component; failure to comply is an unfair or deceptive trade practice under section 411 of the Federal aviation Act, as amended, 49 U.S.C. 1381 (the Act).[1] ATA asks for an immediate blanket exemption

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[1] When it adopted the price advertising policy statement, the Civil Aeronautics Board (CAB) also amended 14 CFR 380.30. (49 Fed. Reg. 49440 and 49438, December 20, 1984). Responsibility for these regulations transferred to the Department on January 1, 1985.

Part 380, which governs public charters, was amended to require that any solicitation material from a direct or indirect air carrier, or an agent of either, for a charter, charter tour or a charter tour component state the entire price to be paid by the consumer to the seller or agent for the travel purchased or component of the package. These changes were intended to reduce deceptive advertising by charter and tour operators, and direct and indirect air carriers.

with respect to the rule's applicability to air-only scheduled service by direct air carriers, pending initiation of a rulemaking proceeding to amend the regulation. ATA asserts that the rulemaking proceeding conducted in this matter by our predecessor, the Civil Aeronautics Board (CAB), was inadequate to support application of section 399.84 to air-only scheduled service. ATA claims that the thrust of the rulemaking proceeding was directed at charter tour operators, not scheduled air carriers, and that the $3 U.S. departure tax was not at the center of the controversy. Accordingly, it asserts that the air carrier industry had inadequate notice that the rule would apply to air-only scheduled service. ATA further maintains that application to air-only scheduled service i not justified or sensible, because the regulation was intended to curb abuses of the charter tour industry. Logistical problems are also alleged with respect to compliance with the rule.

On November 15, 1985, a group of charter airlines and tour operators (the "Joint Petitioners")[2] filed a petition to review and amend 14 CFR 399.84 and 380.30 to the extent necessary to permit all carriers--scheduled and charter--to advertise air fare and tour prices without international departure taxes, provided such taxes are stated elsewhere within each

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[2] Balair, AG; Charter Travel Corp.; Condor Flugdienst GMBH; DER Travel Service, Inc.; German Charters, Inc.; Homeric Tours; Schwaben Int'l,; Tourlite Int'l, Inc.; Travac Tours and Charters, Inc.; and Travel Impressions, Ltd.

ad and promotional material.[3] They also request interim relief to permit them to advertise in such a manner immediately. In the alternative, they ask that the current regulation be applied to all segments of the industry in a uniform manner. The Joint Petitioners assert that scheduled service operators are not including the tax in their promotional materials, as required by our rule, while the Joint Petitioners are doing so. Thus, they argue, they are at an unfair competitive disadvantage. The Joint Petitioners further state that they do not object to the purpose of the regulation, but believe that the international departure tax is not "central to the substance or spirit" of sections 380.30 and 399.84.

Responsive Filings

Donald L. Pevsner: On November 22, Donald L. Pevsner filed comments in opposition to the requests of both the ATA and the Joint Petitioners. Mr. Pevsner, whose 1982 petition concerning deceptive price advertising practices led to the changes in Parts 380 and 399, argues that the $3 international departure tax should be included in the price of all foreign and overseas air transportation. Mr. Pevsner objects to permitting the $3 fee to be placed at the bottom of an ad in small print. He also alleges that by not including the departure tax in the price, carriers are violating section 411 of the Act and, therefore, should be enjoined from continuing the practice. Mr. Pevsner further argues that any fee included on a passenger's ticket should be included in any advertising.

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[3] On November 18, the Joint Petitioners submitted additional examples of carriers allegedly not in compliance with the regulation.

Joint Petitioners: The Joint Petitioners filed an answer to the ATA request and argue that any relief granted should apply to the entire industry, not just a portion of the industry. They disagree that the air carrier industry had insufficient notice that the rulemaking was intended to apply to all services including scheduled services, since the NPRM indicated that the rule would be applied to all.

Transamerica Airlines: Transamerica, an air carrier with both scheduled and charter operations, filed a consolidated answer expressing support for an exemption for all segments of the industry, not just scheduled carriers. Granting relief only to scheduled air carriers, Transamerica asserts, would give them a competitive advantage and, therefore, any relief should apply to all operations. Transamerica also points out that there have been no complaints about the treatment of the $3 tax in advertisements.

People Express Airlines: People Express, a scheduled carrier, supports ATA and asserts that the industry was not given adequate notice of the handling of the $3 tax during the rulemaking process. It claims that the primary thrust of the changes to Parts 380 and 399 was to curb abuses in the passenger charter and tour package industry.

People Express asserts that there is no basis to support the rule with respect to air-only scheduled service, and that the amount in question is de minimus and regulation is not necessary to protect the public.[4]

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[4] People Express also attached a copy of a letter it sent to the Department which questioned the applicability of the rule and the adequacy of notice. People Express did not include a copy of the response, however.

Carefree David Travel: Carefree David, et al., filed in opposition to the ATA petition and in support of the Joint Petitioners' request.[5] Carefree also notes that the NPRM gave all carriers more than sufficient notice that the proposed rules would apply to all carriers. Carefree further argues that since, as the Department recently recognized in approving "half-round trip" advertising, consumers can distinguish between an advertisement that gives a round-trip price and one that provides a one-way price based on the purchase of a round-trip ticket, consumers similarly should be able to recognize that they must pay the additional $4 tax.[6]

Upon consideration of the petitions and answers, we have decided to grant the request of the Joint Petitioners for an exemption from sections 380.30 and 399.84 to permit the exclusion of the U.S. international departure tax from the total advertised price, provided all advertisements clearly state the amount of tax elsewhere in the ad. If the price advertised does not include the U.S. international departure tax, the ad must indicate that the fee is payable by the customer. This means that the industry is free to advertise its services in a variety of

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[5] Carefree David Travel Co., Inc.,; Emerald Tours, LTD.; Fantasy Holidays, Inc; Ferien-Service, LTD.; Hispanidad Holidays, Inc.; Rich International Airways, Inc.; Samson Tours, Inc.; Spanish Heritage Tours, Inc.; Spantax, S.A.; Trans National Travel, Inc.; Unitravel Corp.; and Vacation Travel Concepts, Inc.

[6] "Half-round trip" advertising enables, for example, a carrier to advertise a fare which can only be purchased as part of a round trip fare, i.e., New York to London - $99 (based on purchase of round-trip ticket).

ways. This exemption should permit greater flexibility for the industry to advertise its services, while ensuring that the traveling public is informed of the charges they must pay to take advantage of the service offered. This exemption applies to all those that offer service involving the $3 tax and not just scheduled carriers.[7] However, failure to include in the total price or disclose the $3 tax separately will continue to be a violation of section 411. We do not believe that other relief, such as amending the regulation, is necessary in light of the exemption granted by this order.

We therefore reject arguments advanced by Mr. Pevsner that allowing the $3 international departure tax to be stated separately is deceptive to the consumer. It has long been a common practice in the industry to state this tax separately, and we have received no complaints from consumers indicating that they have been deceived by advertisements or promotional materials that display the $3 tax clearly but separately. Under the circumstances, we have no basis at this time to conclude that the practice has a significant potential to deceive consumers. However, as noted above, failure to disclose the tax in some form will be considered a violation of section 411. This disclosure can be accomplished in a number of different ways, such as by including it in the generally-larger typeface stating the price of the trip, or by using an asterisk with a notation.

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[7] While the Department agrees with the Joint Petitioners that the scheduled carriers had adequate notice of the effectiveness of section 399.84, the exemption addresses the question on an industry-wide basis, without giving one segment a competitive advantage over another.

Therefore, under the authority delegated to the Assistant Secretary of Policy and International Affairs under 49 CFR 1.56, I:

1. Consolidate dockets 43585 and 43596 into docket 43585

2. Deny the petition of the Air Transport Association of America;

3. Grant the request of the Joint Petitioners for an exemption from the provisions of 14 CFR 380.30 and 399.84, so as to permit direct and indirect air carriers for scheduled and charter service and tour operators to state the United States international departure tax separately from other charges in advertisements and promotional materials provided that all such advertisements clearly state the amount of the tax elsewhere in the advertisement and indicate that it must be paid in addition to the advertised price; and

4. Except to the extent granted herein, deny all other requests in docket 43585.

By: Matthew W. Scocozza
Assistant Secretary for Policy and
International Affairs
SEAL

[Exhibit C to Exhibit H to Motion for Temporary Restraining Order]

[Letterhead of Texas Attorney General]

March 9, 1988

B. Wayne Vance
General Counsel
U.S. Department of Transportation
400 Seventh Street, N.W.
Washington, D.C. 20590

Re: Your March 2 letter regarding surcharges

Dear Mr. Vance:

I am responding to your March 2 letter, on behalf of myself and my fellow Attorneys General in Colorado, Kansas, Massachusetts, and New York, all of whom received similar letters from you.

In short, we continue to support and intend to enforce the National Association of Attorneys General ("NAAG") Guidelines which we adopted last December.

Your letter specifically objects to the requirements of the Guidelines that (1) require all surcharges to be included in the advertised fare, and (2) prohibit advertising one-way fares based on a required round-trip purchase.

We continue to believe that an advertisement should tell the traveller the exact cost of the fare advertised. Allowing airlines to exclude "surcharges" from the advertised fare deceives the public.

Neither of these two Guidelines imposes any additional obligation on the airlines, restricts their creativity, or requires additional disclosure -- complaints which we have heard about other Guideline provisions. In our discussions with the airlines last summer, most airlines told us that they did not object to requirements of this nature -- as long as they were uniformly applied. That is what the Guidelines (and our follow-up memorandum of February 3) accomplish. The Guidelines simply advise the airlines that they must tell their customers the full truth about their fares.

And the airlines are doing so, with no apparent problem. See, for example, the attached advertisements for Southwest Airlines and Pan Am, which appeared locally in January, after the Guidelines took effect (both ads are reduced in size to permit copying).

It is curious that DOT would choose to focus its complaints to us on these particular Guidelines, which are easily met. However, your letter does not really argue that NAAG's Guidelines are either difficult to meet or that they do not help prevent deception. Instead, you have raised again the issue of preemption.

The Guidelines were carefully tailored to avoid the Airline Deregulation Act preemption of state action relating to rates, routes, and services. As you are aware, the leading case on this issue says that nothing in that Act was intended to prevent states from regulating deceptive advertising practices by airlines. People v. Western Airlines, Inc., 155 Cal. App. 3d 597, 202 Cal. Reptr. 237, *cert. denied* 469 U.S. 1132, 105 S.Ct. 815 (1984). See also Brunwasser v. Trans World Airlines, Inc., 541 F.Supp. 1338 (W.D.

Pa. 1982), which holds that the Act does not preempt a private citizen's action for deceptive practices under Pennsylvania's consumer protection law.

Further, you have offered no legal basis to establish that enforcement of these two Guideline is preempted, except an agency decision permitting airlines to factor out a $3.00 departure tax. DOT's own regulations in fact require that all surcharges be included in the full advertised fare. We therefore conclude that the Act itself does not preempt our enforcement of the Guidelines.

Preemption may also occur if Congress evidences an intent for the federal government to occupy the entire field. Congress had that opportunity to do so in the Deregulation Act and chose in fact to provide limited preemption -- not the entire field of regulating the practices of airlines. We concede that the Department is by law, and should be in practice, the primary regulator of the airlines' practices. The real problem here is that the Department, instead of acting to protect consumers, has instead chosen inaction. In your letter, you suggest that the Department's inaction in this area preempts state action. This assertion is untenable.

If the Department had acted within its mandate to protect consumers, there would have been no need for the Guidelines. However, through its inaction, the Department has created a void which was filled by the state attorneys general acting to protect their citizens from deceptive practices by the airlines. We will continue to act to protect our citizens.

Your letter closes with a threat of formal legal action to prevent us from enforcing the Guidelines. We question how such an aggressive position taken

against the sovereign states can possibly comply with President Reagan's Executive Order 12612 (October 26, 1987) on federalism and preemption.

We do not seek confrontation with the Department. We do not desire to engage in baseless litigation brought by the Department. But threats to sue us will not chill our efforts to fulfill our own duties to protect our citizens.

It is our understanding that we will be meeting with you next Monday, March 14. We look forward to a productive meeting.

Very truly yours.

/s/JIM MATTOX
Attorney General of Texas

[Exhibit D to Exhibit H to Motion for Temporary Restraining Order]

Order 88-3-25

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 10th day of March, 1988

SERVED MARCH 16, 1988

Amendment of exemption to allow separate listing of service fees in advertisements for air transportation. — Docket 43585 43596

ORDER AMENDING EXEMPTION

On December 20, 1984, the Civil Aeronautics Board (CAB) adopted the price advertising policy statement, 14 CFR 399.84, declaring that any advertising of flights, tours, or components of tours must state the entire price of the flight, tour, or tour component; failure to comply is an unfair or deceptive practice within the meaning of section 411 of the Federal Aviation Act, as amended, 49 U.S.C. 1381 (the Act)[1]

[1] When it adopted the price advertising policy statement, the Civil Aeronautics Board (CAB) also amended 14 CFR 380.30. (49 Fed. Reg. 49440 and 49438, December 20, 1984). Responsibility for these regulations transferred to the Department on January 1, 1985. Part 380, which governs public charters, was amended to require that any solicitation material from a direct or an indirect air carrier, or agent of either, for a

This order amends an exemption from that rule. The amendment allows advertisers to separately list certain service fees and taxes in advertisements as long as the amounts of each charge are listed separately or in total.

BACKGROUND

On November 15, 1985, a group of charter airlines and tour operators (Joint Petitioners)[2] filed a petition with the Department of Transportation to review and amend 14 CFR 399.84 and 380.30 to the extent necessary to permit air carriers – scheduled and charter – to advertise air fare and tour prices without international departure taxes, provided such taxes are stated elsewhere within each ad and promotional material. On December 24, 1985, the Department issued Order 85-12-68, granting an exemption from the provisions of 14 CFR 380.30 and 399.84, so as to permit direct and indirect air carriers for scheduled and charter service and tour operators to state the United States international departure tax separately from other charges in advertisements and promotional materials, provided that all such advertisements clearly state the amount of the tax elsewhere in the advertisement and indicate that it must be paid in addition to the advertised price.

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charter tour or a charter tour component state the entire price to be paid by the consumer to the seller or agent for the travel purchased or component of the package. These changes were intended to reduce deceptive advertising by charter and tour operators, and direct and indirect air carriers.

[2] Balair, AG; Charter Travel Corp.; Condor Flugdienst GMBH; DER Travel Service, Inc.; German Charters, Inc.; Homeric Tours; Schwaben Int'l., Inc; Tourlite Int'l., Inc.; Travac Tours and Charters, Inc.; and Travel Impressions, Ltd.

Since the grant of the exemption in late December 1985, there has been a proliferation of other fees and charges, some suggested and imposed by airlines, but most charged for services provided by various U.S. government agencies. In some international markets, there is a security fee for each flight to the United States. In addition, the U.S. government has imposed a $5 customs fee and a $5 immigration fee, and a $1 tourism fee has been proposed for certain international flights. Some States and municipalities have imposed fuel surcharges of varying amounts to ticket charges.

For advertisers to comply literally with current provisions of sections 380.30 and 399.84, the are obligated to include the total cost of all such fees and charges in the advertised price. Advertisers find this difficult because they often advertise the each-way fare and state that roundtrip purchase is necessary to use the advertised price. However, security charges do not apply in all international markets, and immigration and custom fees apply only on the return segment of the trip. Fuel surcharges generally apply only on the flight leaving the State or city making such an assessment and not on the return.

As a result of the variety of additional fees and charges imposed on air travelers for a variety of services, advertisers are confused as to how the charges for such services must be presented (including the charges in the total advertised price for the reasons stated above) and in many instances, readers are not receiving the true picture of what their trip will cost. Some advertisers are stating the total amount of additional charges separately and identifying them as departure tax, custom fees,

immigration fees, etc. Some advertisers are stating the total additional charge separately and merely identifying it as "tax and services." Still others do not state an additional charge separately but merely include the statement that "tax and service charges are not included." Finally, some advertisers make no mention of the additional fees and charges at all. In many cases, readers are not aware of significant additional charges until after they have made their decision to travel based upon the only price stated.

AMENDMENT OF EXEMPTION

We want to continue to allow the industry the freedom to advertise its services in a variety of ways and we want to encourage open price competition. However, we must also ensure that the traveling public is informed of the total amount of charges they must pay to take advantage of services offered. We believe this can best be accomplished in a fashion similar to that involving the $3 U.S. departure tax and mandatory service packages.

We have decided to amend the exemption from sections 380.30 and 399.84 in Order 85-12-68 to permit the exclusion of foreign departure taxes (if collected by the advertiser), customs fees, immigration fees, security fees, agriculture inspection fees, tourist and fuel surcharges and any other surcharges that may be imposed by the U.S. Federal, State or local governments or foreign governments, from the total advertised price, provided all advertisements clearly identify and state the amount of the charges elsewhere in the ad, as a total or separately.

The cost of such surcharges may be included in the total advertised price. If so, the advertiser would not be required to list the charges separately but could

state that they are included. However, if the total advertised prices does not include all amounts for such charges, the cost must be stated clearly and conspicuously elsewhere in one of two ways. First, the total of the additional charges may be stated as one amount, so long as the kinds of charges covered by that amount are itemized. Or if the advertisers choose, they may state separately each of the charges provided and the individual amount for each. The ad must clearly indicate that the additional charges are payable by the customers.

As long as the charges for such services are stated and the services are identified, readers should readily know what they will pay for their complete transportation package. Separate itemization is already required for services comprising "mandatory" package supplements and other special services under our rules. Such disclosure appears to cause no particular compliance problems for advertisers, and, at the same time, we have received few complaints from consumers indicating that they have been deceived by advertisements or promotional materials that in fact identify special services and display the additional charges separately in legible type. We therefore have no basis at this time to deny adequate separate disclosure as a practical remedy to a growing travel industry problem. Nevertheless, failure to disclose all additional costs clearly and conspicuously will be considered an unfair and deceptive practice in the sale of transportation within the meaning of section 411 of the Federal Aviation Act. This disclosure can be accomplished, for example, by including the additional costs in the generally-larger typeface stating the price of the trip or by using an asterisk with a notation showing the total cost of the

additional charges with the kind of charges itemized, or the charges can be stated with each cost presented separately.

ACCORDINGLY:

1. The exemption from the provisions of 14 CFR 380.30 and 399.84 granted in Order 85-12-68 is amended to permit direct or indirect air carriers for scheduled and charter service, including tour operators, to state foreign departure taxes, security charges, custom fees, immigration fees, security fees, agricultural inspection fees, tourism and fuel surcharges, as well as any other surcharges (when these items are collected by offeror) that may be imposed by the U.S. Federal, State or local governments or foreign governments, separately from other charges in advertisements and promotional materials, provided that all such advertisements clearly and conspicuously state elsewhere in the advertisement the amount of such charges and the services such charges cover and indicate that such charges must be paid by the consumer in addition to the advertised price.[3]

2. This amendment becomes effective 30 days after the service date of this order.

By: MATTHEW V. SCOCOZZA
Assistant Secretary for Policy
and international Affairs

(SEAL)

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[3] This action in no way alters the exemption already granted with respect to the $3 U.S. departure tax.

[Title omitted in printing.]

AFFIDAVIT FOR AUTHENTICATION OF BUSINESS RECORDS

STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, personally appeared Sterling Mayes, who, being by me duly sworn, deposed and said:

1. My name is Sterling Mayes. I am over 18 years of age, of sound mind, capable of making this affidavit, and personally acquainted with the facts stated in it.

2. I am the office manager of the Dallas Regional Office of the Texas Attorney General and as such I am custodian of the records of the Attorney General attached to this affidavit.

3. The records attached to this affidavit, consisting of 8 pages, are letters sent or received by the Attorney General in the regular course of its business. It was the regular course of that business for an employee or representative of the business with knowledge of the act, event, condition, opinion or diagnosis recorded to file the letters. The records attached hereto are exact duplicates of the originals.

4. These 8 pages consist of 6 letters, as follows:

a. June 12, 1987 letter from Stephen Gardner, Assistant Attorney

General, to Tom Ahlf, Assistant General Counsel, Trans World Airlines, Inc. (mailed by this office on that date)

b. June 12, 1987 letter from Stephen Gardner to Charles Goolsbee, General Counsel, Texas International Air (mailed by this office on that date)

c. June 22, 1987 letter from Richard Anderson, Corporate Attorney, Continental Airlines, to Stephen Gardner (received by this office on June 24, 1987)

d. February 11, 1988 letter from Thomas J. Ahlf, Assistant General Counsel, Trans World Airlines, Inc., to Stephen Gardner (received by this office on February 16, 1988)

e. June 9, 1988 letter from Stephen Gardner to John Williams, Continental Airlines (mailed by this office on that date)

f. December 14, 1988 letter from Karen K. Crider, U.S. Counsel, British Airways Plc., to Stephen Gardner (received by this office on December 14, 1988)

[Signature and jurat omitted in printing.]

[Letterhead of Texas Attorney General]

June 12, 1987

VIA FEDERAL EXPRESS

Tom Ahlf, Esq.
Assistant General Counsel
Trans World Airlines, Inc.
605 Third Avenue, 43rd Floor
New York, New York 10158

Dear Mr. Ahlf:

I am writing as a follow-up to our telephone conversation on June 10.

As I told you then, Texas Attorney General Jim Mattox and other state attorneys general are concerned that the fuel surcharge should not be applied in a deceptive manner.

Specifically, I am writing to advise that failure to include any surcharge in the fare price advertised or quoted will be viewed by this office as a false, misleading, and deceptive practice, in violation of the Texas Deceptive Trade Practices -- Consumer Protection Act, Texas Business and Commerce Code Sections 17.41 et seq. ("DTPA").

Disclosure of the surcharge other than in the fare price will not suffice. For example, it would violate the DTPA to advertise a $99.00 one-way fare from Dallas to New York City, only to add a $6.00 fuel surcharge which is disclosed in a footnote or elsewhere in the advertisement.

This letter does not constitute a finding that your airline has already violated the DTPA. Rather, it

is sent in an effort to avoid future violations. This same letter is being sent today to all major airlines operating in Texas which are known to be considering fuel surcharges.

If you have any questions regarding our policy in this matter, please feel free to telephone me at (214) 742-9698.

Thank you in advance for your cooperation.

Very truly yours,

/s/STEPHEN GARDNER
Assistant Attorney General

[Letterhead of Texas Attorney General]

June 12, 1987

VIA FEDERAL EXPRESS

Charles Goolsbee, Esq.
General Counsel
Texas International Air
333 Clay Street
Houston, Texas 77002

Dear Mr. Goolsbee:

Recently, many of the nation's airlines have raised the possibility of adding a fuel surcharge to airfares this summer. Your airline has been identified as considering this move.

Texas Attorney General Jim Mattox and other state attorneys general are concerned that the fuel surcharge should not be applied in a deceptive manner.

Specifically, I am writing to advise that failure to include any surcharge in the fare price advertised or quoted will be viewed by this office as a false, misleading, and deceptive practice, in violation of the Texas Deceptive Trade Practices -- Consumer Protection Act, Texas Business and Commerce Code Sections 17.41 et seq. ("DTPA").

Disclosure of the surcharge other than in the fare price will not suffice. For example, it would violate the DTPA to advertise a $99.00 one-way fare from Dallas to New York City, only to add a $6.00 fuel surcharge which is disclosed in a footnote or elsewhere in the advertisement.

This letter does not constitute a finding that your airline has already violated the DTPA. Rather, it is sent in an effort to avoid future violations. This same letter is being sent today to all major airlines operating in Texas which are known to be considering fuel surcharges.

If you have any questions regarding our policy in this matter, please feel free to telephone me at (214) 742-9698.

Thank you in advance for your cooperation.

Very truly yours,

/s/STEPHEN GARDNER
Assistant Attorney General

[Letterhead of Continental Airlines]

June 22, 1987

Mr. Stephen Gardner
Assistant Attorney General
State of Texas
714 Jackson, Suite 700
Dallas, Texas 75202

Dear Mr. Gardner:

This is to acknowledge receipt of your letter dated 12 June 1987 to Mr. Charles Goolsbee of Texas Air Corporation regarding fuel surcharges contained in airfare advertisements. Your letter was forwarded to the undersigned for disposition.

At this time, Continental Airlines will include any fuel price increase in the quoted fare; it will not be disclosed in a footnote as a fuel surcharge. Nonetheless, we do not concede to the position stated in your letter for several reasons.

Your letter was premature, in that no public advertisement had been made regarding fuel price increases. While we appreciate your cooperative and candid comments, it is not reasonable to allege a very serious violation of V.T.C.A., Bus. & C., Section 17.41 et seq., without first having actually reviewed the advertisement. In our opinion, a prominently displayed footnote adding the fuel surcharge or any number of other straight forward and clearly stated methods could be employed without being false or misleading.

The advertising practice of including additional charges by way of footnote to the stated price is a prevalent practice both within and without

the airline industry. Specifically within the airline industry, several airports in the U.S. assess a surcharge for each passenger; this surcharge is commonly advertised by way of a footnote, as are departure and custom taxes. Likewise, a quick review of any local newspaper will reveal similar advertising practices in the automobile industry. Footnotes to stated prices indicate that charges will be added for taxes, title, licenses, dealer preparation, or that the final purchase price may be different than the advertised price. As you well know, the actual price is likely to be several thousand dollars more than the stated price.

Therefore, we believe that the advertising of fares with footnoted surcharges, when prominently and openly displayed, are common methods of advertisement which are familiar and fair to consumers.

Finally, your letter assumes that the State of Texas has the authority to regulate an interstate air carrier licensed under the Federal Aviation Act as amended, 49 U.S.C.A. §1301 et seq., (hereinafter referred to as the "Act"). We respectfully submit the State of Texas is preempted from regulating the advertising practices of Continental Airlines or any other airline subsidiary of Texas Air Corporation.

Section 105(a) of the Act, provides in pertinent part:

FEDERAL PREEMPTION

> (1) Except as provided in paragraph (2) of this subsection, no state or political subdivision thereof and no interstate agency or other political agency of two or more states shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation. (Emphasis added).

In granting exclusive regulatory authority over the airline industry to the Federal Government, Congress gave the Department[1] specific, statutory guidelines to regulate advertising practices. The following statutory provisions have nearly identical language to the DTPA, supra, and seek to prohibit the same practices encompassed by state law.

The Act, 49 U.S.C.A. §1302(a)(3) provides the broad policy directives of airline regulation including:

> [Provision for] the availability of a variety of adequate, economic, efficient,

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[1] The authority to regulate the airline industry was transferred to the Department of Transportation upon abolition of the Civil Aeronautics Board. See 49 U.S.C.A. §1551, Subsection (b)(1)(E) which provides, "All authority of the Board under this chapter which is not terminated. . .is transferred to the Department of Transportation".

> and low price services by air carriers and foreign air carriers without . . . unfair or deceptive practices. (Emphasis added).

Additionally, 49 U.S.C.A §1381(a) (see cases cited thereunder) provides specific enforcement authority to the DOT:

> The board may, upon its own initiative . . . if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier . . . has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. (Emphasis added)

The clear import of these statutory provisions is to place exclusive regulatory authority over all airline "rates, routes, and services", with the Federal government. Congress sought to prevent a myriad of conflicting regulatory schemes by state government after the retreat of the Federal government from virtually complete operational control of "rates, routes, and services". Your seeking to impose state regulation over matters relating to rates and services would frustrate the desire of Congress for:

> The encouragement, development, and maintenance of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices, and to determine the variety, quality, and price of air transportation services. 49 U.S.C.A. §1302(a)(q).

In conclusion we strongly urge that any state regulation of our advertising practices by the Texas Attorney General's Office would be improper under Federal Law and that your specific complaint regarding fare surcharges is groundless. We offer these comments in a spirit of frank and open communication; please feel free to contact the undersigned regarding this matter.

Very truly yours,

/s/Richard Anderson
Corporate Attorney

cc: Ben Hirst
Charles Goolsbee
Jim O'Donnell
Richard Metzner

[Letterhead of Trans World Airlines]

February 11, 1988

Stephen Gardner, Esq.
Assistant Attorney General
714 Jackson Street
Suite 700
Dallas, Texas 75202

Dear Mr. Gardner:

Please excuse my slightly tardy response to your letter dated February 3, 1988, which the U.S. Postal Service was apparently reluctant to relinquish

Guideline 2.5 of the NAAG guidelines is a verbatim repetition of guideline 1.9 of the draft guidelines circulated last fall. The U.S. Department of Transportation, in its comments on the initial guidelines, clearly stated its view of guideline 1.9:

> Subsections 1.9 and 1.10, requiring surcharges to be included in the total price advertised and prohibiting advertisement of one-way fares based on roundtrip purchase only, respectively, are also in conflict with Federal rules. The Department rule on price advertising is in 14 CFR 399.84. That rule and Department interpretations of it allow separate disclosure of defined surcharges and the advertisement of one-way fares if the restriction on roundtrip-only purchase is disclosed. We believe the Guidelines are thus preempted in this area.

In light of those comments, TWA finds the case for preemption of guideline 2.5 to be particularly compelling. Accordingly, although we have sought and will continue to seek to cooperate with NAAG in order to ensure that TWA's advertisements are nondeceptive and fairly portray the services offered by TWA, we cannot concur in the apparent view of the seven states listed in your letter that guideline 2.5 has somehow escaped preemption. We would, however, welcome any explanation of the reasoning and precedent upon which you have relied in concluding that there has been no preemption. TWA's current understanding is that guideline 2.5 appears to be a decidedly inappropriate vehicle for the type of joint enforcement approach embodied in your letter of February 3.

Very truly yours,

/s/Thomas J. Ahlf

[Letterhead of British Airways]

BY TELEFAX
AND REGISTERED MAIL
RETURN RECEIPT REQUESTED

December 14, 1988

Stephen Gardner, Esq.
Assistant Attorney General
The Attorney General of Texas
714 Jackson, Suite 700
Dallas, Texas 75202

Re: Disclosure of Fare Surcharges in Advertisements

Dear Mr. Gardner:

British Airways has considered your letters of November 14 and December 9, 1988 advising us of your intention to take legal action against British Airways unless British Airways discontinues its current method of advertising fares. As you noted in your letter of November 14, British Airways' disclosure of fare surcharges has been consistent with the regulations of the United States Department of Transportation. Notwithstanding the federal regulation in this area, you have advised us that you intend to take legal action against British Airways because our advertisements do not comply with what you represent to be the laws of the states of California, Massachusetts, New York, Texas and Washington.

British Airways believes that state law in this area has been preempted by the Federal Aviation Act of 1958 and regulations promulgated by the

Department of Transportation. Without prejudice to this position, however, British Airways will discontinue its planned fare advertising and will either refrain from fare advertising or will comply with your requirements for disclosure of fare surcharges until such time as your requirements are changed or there is a determination that state law is preempted or the states are otherwise without jurisdiction.

Sincerely,

/s/Karen K. Crider
U.S. Counsel
(718) 397-4250

[Certificate of Service omitted in printing.]

[Title omitted in printing.]

DEFENDANT'S ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now, Defendant, Jim Mattox, Attorney General of the State of Texas, and files this his Original Answer and would respectfully show the Court the following:

THE PARTIES

1. Defendant admits the first sentence of Paragraph 1. Defendant admits the second sentence of Paragraph 1 except that Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment that TWA is a "certified air carrier," and Defendant specifically denies TWA's characterization of regulation by the Department of Transportation ("DOT") as "extensive." Defendant admits the third sentence of Paragraph 1.

2. Defendant admits the first sentence of Paragraph 2. Defendant admits the second sentence of Paragraph 2 except that Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment that a continental is "certificated air carrier", and Defendant specifically denies Continental's characterization of regulation by the DOT as "extensive." Defendant admits the third sentence of Paragraph 2.

3. Defendant admits the first sentence of Paragraph 3. Defendant admits the second sentence of Paragraph 3 except that Defendant is without

knowledge or information sufficient to form a belief as to the truth of the averment that British Airways is a "holder of a foreign air carrier permit," and Defendant specifically denies British Airway's characterization of regulation by the DOT as "extensive." Defendant admits the third sentence of Paragraph 3.

4. Defendant admits the first sentence of Paragraph 4. Defendant denies the second sentence of Paragraph 4 but admits that pursuant to the provisions of the Texas Deceptive Trade Practices Act, the Consumer Protection Division of the Office of the Attorney General, acting in the name of the State of Texas, is responsible for enforcing the various provisions of Texas law made an issue by Plaintiffs.

5. Defendant denies the allegations of Paragraph 5.

6. As to the first sentence of Paragraph 6, Defendant denies that venue is properly laid before this Court, but admits that he is a resident of and maintains an office in the Western District of Texas. Defendant further denies that Plaintiffs' claims for relief arose in this district, because all the actions upon which Plaintiffs base their claims for relief were taken by a member of the Consumer Protection Division acting in the name of the State of Texas at the Office of the Attorney General located in Dallas, Texas, which is in the Northern District of Texas. Defendant admits the second sentence of Paragraph 6. Defendant denies the third sentence of Paragraph 6.

7. As to Paragraph 7, Defendant denies that any threatened implementation or enforcement of the guidelines is unconstitutional as applied to Plaintiffs' conduct relating to rates, routes or services,

including their advertising and marketing practices thereto, with specific reference to the advertisement of fuel, tax and other surcharges. Defendant admits that Plaintiffs are seeking a declaratory judgment and preliminary and permanent injunctive relief. Defendant denies that Plaintiffs are entitled to a declaratory judgment or any preliminary or permanent injunctive relief.

8. Defendant admits that pursuant to the Federal Aviation Act, the DOT and its predecessor the Civil Aeronautics Board ("CAB") have promulgated rules and regulations governing activities related to air transportation by air carriers and foreign air carriers. Defendant denies that these rules and regulations were "extensive". Defendant admits that the CAB has promulgated a rule and/or regulation which relates to unfair deceptive practices in the airline industry, including standards governing price advertising. Defendant denies that the DOT has promulgated any rule or regulation which relates to unfair and deceptive practices. Defendant denies the remainder of Paragraph 8.

9. Defendants admits that Congress granted the CAB the authority to consider, as being in the public interest, the "prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation . . . ." Defendant denies the characterization by Plaintiffs that "Congress expressly granted the CAB the authority to promote the public interest." Defendant admits that Congress authorized the CAB in Section 411 of the Federal Aviation Act to determine whether any air carrier or foreign air carrier "has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof, and that in the

event the CAB finds that a carrier "is engaged in such unfair or deceptive practices or other unfair methods of competition, it shall order such air carrier to cease and desist . . . ." Defendant denies all remaining portions of Paragraph 9.

10. Defendant admits Paragraph 10.

11. Defendant admits the first sentence of Paragraph 11. Defendant denies the second sentence of Paragraph 11. Defendant admits the quotations from the legislative history contained in the third and fourth sentences of Paragraph 11, but denies any inferences drawn therefrom and denies Plaintiffs' characterizations of the meaning of those quotations.

12. Defendant admits the first sentence of Paragraph 12. Defendant denies the second and third sentences of Paragraph 12 but admits that in June 1987, Defendant co-sponsored a resolution directing the NAAG Consumer Protection Committee to designate a task force of states to study the air travel industry to determine the extent and nature of practices that are unfair or deceptive and directing the task force to present its findings along with an recommended course of action at the next NAAG meeting in December 1987.

13. Defendant admits the first and second sentences of Paragraph 13. A complete copy of the Guidelines can be found at ANTITRUST AND TRADE REGULATION REPORT (BNA) Vol. 53, No. 1345 at S-2 (December 17, 1987). As to the third sentence, Defendant denies Plaintiffs' characterization of the purpose and effect of the Guidelines as the purpose and effect of the guidelines is clearly stated in the Guidelines themselves.

14. Defendant admits the first sentence of Paragraph 14. Defendant denies the second sentence of Paragraph 14. Defendant admits that the statements attributed to the Federal Trade Commission in the third sentence of Paragraph 14 are accurate, but denies any inferences to be drawn therefrom. Similarly, Defendant admits that the statements attributed to the DOT in the last sentence of Paragraph 14 are accurate but denies any inferences to be drawn therefrom.

15. Defendant admits Paragraph 15.

16. Defendant admits the first sentence of Paragraph 16. Defendant further admits that the Guidelines concern in part disclosures in fare advertisements of material conditions connected with the purchase of tickets, concern in part terms and conditions of frequent flyer programs, and concern in part terms and conditions of incentives offered to induce passengers to give up their seats on overbooked flights. Defendant denies that the Guidelines "require," "specify," "purport to regulate," and "direct" any actions by airlines. Defendant denies the remainder of Paragraph 16.

17. Defendant admits the first sentence of Paragraph 17. Defendant denies the second sentence of Paragraph 17. Defendant admits that various state attorneys general have taken the position that the Guidelines are proper interpretations of their existing state laws and have further taken the position that they will enforce their existing state laws against air carriers, but Defendant otherwise denies the third sentence of Paragraph 17.

18. Defendant admits that state attorneys general have taken action to enforce compliance with their state laws with respective to full price advertising and roundtrip price advertising by airlines, but denies that these actions were seeking to enforce compliance with the sections of the Guidelines. Defendant admits the remainder of the first sentence of Paragraph 18, but denies any inferences to be drawn therefrom. Defendant also admits the second sentence of Paragraph 18 but also denies any inferences to be drawn therefrom. Defendant denies the third sentence of Paragraph 18 because its averments are too general to permit Defendant to form a belief as to the truth of the averments.

19. Defendant admits that he has indicated an intent to take enforcement action with respect to certain aspects of fair advertising which are illegal under Texas law, but denies that he has indicated an intent to "take enforcement action implementing the Guidelines' fair advertising provisions," and further denies the remainder of the first sentence of Paragraph 19. Defendant admits that the Consumer Protection Division of the Attorney General's Office, acting in the name of the State of Texas, has given the notice required by the Deceptive Trade Practices Act to the three plaintiff airlines. Defendant denies that this action by the Consumer Protection Division was in Defendant's official capacity. Defendant can neither admit or nor deny the statement in Paragraph 19 that this action was "in concert with other state attorneys general" because that averment has not been specifically pleaded in a manner sufficient to permit Defendant to form a belief as to the truth of the averment. Defendant denies that he

has threatened to institute enforcement proceedings against Plaintiffs if their advertising practices do not conform to the Guidelines, and otherwise denies the remaining portions of the first and second sentences of Paragraph 19. Defendant admits the content of the third sentence of Paragraph 19, together with the parenthetical fourth sentence, but denies any inference to be drawn therefrom. Defendant denies the final sentence of Paragraph 19.

20. As to the first sentence of Paragraph 20, Defendant denies that Mr. Gardner's letter indicated that the states would initiate enforcement actions under their respective laws, admits that he did notify the airlines that the states might initiate enforcement actions, and otherwise denies the averments in that sentence. Defendant admits the second sentence of Paragraph 20. Defendant admits the last sentence of Paragraph 20, but denies any inferences to be drawn therefrom.

21. Paragraph 21 is a reallegation of Paragraph 1 through 20 which have been admitted or denied above.

22. Defendant admits Paragraph 22.

23. Defendant denies Paragraph 23.

24. Defendant admits Paragraph 24.

25. Defendant admits Paragraph 25.

26. Defendant denies Paragraph 26.

27. Defendant denies the first sentence of Paragraph 27. Defendant admits that the DOT's general counsel has informally expressed an opinion that aspects of the regulation of deceptive or unfair advertising practices by airlines was preempted, but

denies any inference to be drawn therefrom and further denies that there is any legal effect by this proclamation. Defendant otherwise denies the remainder of Paragraph 27.

28. Defendant denies Paragraph 28.

29. Defendant denies the first, third, fourth, and fifth sentences of Paragraph 29. Defendant can neither admit nor deny the second sentence of Paragraph 29 because Plaintiffs have not specified the source of their reference with sufficient specificity to permit Defendant to form a belief as to the truth of the averment.

30. Defendant denies Paragraph 30.

31. Defendant denies Paragraph 31.

32. Defendant denies the first sentence of Paragraph 32. Defendant denies the second sentence of Paragraph 32 for the reason that the underlying provision of federal law cited by Plaintiffs, 49 U.S.C. §1373, ceased to be in effect on January 1, 1983, pursuant to 49 U.S.C. §1551(a)(2)(A).

33. Defendant denies Paragraph 33.

34. Defendant denies Paragraph 34.

35. Paragraph 35 is a reallegation of Paragraphs 1 through 34 which have been admitted or denied above.

36. Defendant admits Paragraph 36.

37. Defendant denies Paragraph 37.

38. Defendant denies Paragraph 38.

39. Defendant denies all of Paragraph 39 except the averment that the Attorney General of New Mexico "objects to the Guidelines."

40. Defendant denies Paragraph 40.

41. Defendant denies Paragraph 41.

42. Defendant denies Paragraph 42.

43. Defendant is without knowledge or information sufficient to form a believe as to the truth of the averments in Paragraph 43.

44. Defendant denies Paragraph 44.

45. Defendant denies Paragraph 45.

46. Defendant denies Paragraph 46.

47. Paragraph 47 is a reallegation of Paragraphs 1 through 46 which have been admitted or denied above.

48. Defendant admits Paragraph 48.

49. Defendant denies Paragraph 49.

50. Defendant denies Paragraph 50.

51. Paragraph 51 is a reallegation of Paragraphs 1 through 50 which have been admitted or denied above.

52. Paragraph 52 contains legal argument and no factual averments. To the extent necessary, Defendant denies any factual averments in Paragraph 52.

53. Paragraph 53 contains legal argument and no factual averments. To the extent necessary,

Defendant denies any factual averments in Paragraph 53.

54. Defendant denies Paragraph 54.

55. Defendant denies Paragraph 55.

56. Defendant denies Paragraph 56.

57. Defendant denies Paragraph 57.

58. Defendant denies Paragraph 58.

To the extent necessary, Defendant denies all other factual averments contained in any unnumbered paragraph of the Complaint and specifically deny that Plaintiffs are entitled to any relief sought in their Complaint.

AFFIRMATIVE DEFENSES

1. Defendant asserts that this Court is without subject matter jurisdiction over Plaintiffs' Complaint.

[Signatures and certificate of service omitted in printing.]

[Title omitted in printing.]

MOTION OF PAN AMERICAN WORLD AIRWAYS, INC. FOR LEAVE TO INTERVENE

Pan American World Airways, Inc. ("Pan Am") files this Motion for Leave to Intervene in this action, and in support thereof would show the following:

1. The three existing plaintiffs in this action seek declaratory and injunctive relief regarding the actions of Attorney General Jim Mattox, and those in active concert or participation with him, in attempting to enforce through state law the Air Travel Industry Enforcement Guidelines ("Guidelines") which have been promulgated by the National Association of Attorneys General ("NAAG"). These Guidelines purport to regulate the advertisement of rates, routes and services not only by the named plaintiffs, but also by Pan Am and other similarly situated air carriers. Pursuant to the Federal Aviation Act of 1958 as amended, 49 U.S.C. §§1301 et seq., Pan Am and the named plaintiffs all look to the U.S. Department of Transportation (DOT) rather than to the individual states, for what constitutes permissible and non-deceptive advertising practices.

2. This Court has previously granted to the named plaintiffs a preliminary injunction which specifically provides as follows:

> It is further ORDERED that the Attorney General of the State of Texas, Jim Mattox, individually and in his official capacity, and all other persons

> acting for the Attorney General in either capacity, and all other persons acting in concert or participation with Attorney General Mattox or on his behalf, and all other persons having actual knowledge of this Order, be and hereby are ENJOINED from:
>
> > Initiating any enforcement action pursuant to Tex. Bus. & Comm. Code §§ 17.41 et seq., or any other provision of state law, which would seek to regulate or restrict any aspect of the individually named plaintiff airlines' air fare advertising or the operations involving their rates, routes and/or services.

Order of January 30, 1989, at 2-3 (emphasis added).

3. Although the named plaintiffs enjoy this protection, Pan Am does not. In fact, Pan Am has been threatened with enforcement actions not only by Attorney General Mattox, but also by the Attorneys General of four other states on whose behalves Mr. Mattox's office apparently acts. See Affidavit of John M. Bloodworth at ¶ 6 (attached as Exhibit A and incorporated herein by reference). Therefore, Pan Am is exposed to selective enforcement actions by Attorney General Mattox which violate the spirit, although not the letter, of this Court's preliminary injunction.

4. On February 28, 1989, Attorney General Mattox fulfilled his earlier threat and filed suit against Pan Am in the 101st District Court of Dallas County, Texas, under Cause No. 89-2510-E, styled

State of Texas v. Pan American World Airways, Inc. (A certified copy of Plaintiff's Original Petition in that suit is attached as Exhibit B.) In that Texas state court action, the Attorney General seeks to enjoin Pan Am and to collect damages from Pan Am for advertising its air fares in conformity with DOT's regulations, because such advertising allegedly violates Tex. Bus. & Com. Code §§17.41 et seq. Whether Texas, through Attorney General Mattox, has the authority to regulate such advertising or has been pre-empted from such efforts by the Federal Aviation Act is an issue at the very heart of this proceeding. On March 14, 1989, Pan Am removed the state action to the United States District Court for the Northern District of Texas, Cause No. CA3-89-0713-H.

5. As evidenced by the fact that Attorney General Mattox has initiated an action against Pan Am in Texas state court, none of the litigants presently before this Court are situated so as to adequately protect Pan Am's interest, which may be fundamentally affected by the outcome of this proceeding.

6. The inability of the present named plaintiffs to adequately represent Pan Am's interests is further evidenced by pleadings which Attorney General Mattox has filed in this action, wherein Attorney General Mattox admitted that the present named plaintiffs are not adequately situated to represent and defend Pan Am's interests. Specifically, Attorney General Mattox has alleged as follows:

> The Preliminary Injunction permits the Plaintiffs to compete unfairly with their competitors because it frees them of the burden of complying with the Deceptive Trade Practices Act. Staying the injunction harms the Plaintiffs only insofar as it requires them to compete fairly with their competitors. As long as their competitors remain subject to a DTPA enforcement action, the Plaintiffs are not harmed by also being subject to such action pending appeal of this case.

Defendant's Motion to Stay or Modify the Preliminary Injunction Pending Appeal, at 2-3 (filed February 10, 1989) (emphasis added).

6. Because Pan Am (l) has an interest in adjudicating the constitutionality of the NAAG Guidelines and the attorney generals' present or threatened enforcement actions, which are the subject of this action, (2) is so situated that the disposition of this action may as a practical matter impair or impede its ability to protect that interest, and (3) is neither adequately represented nor its interests adequately protected by the existing parties, Pan Am seeks leave to intervene of right as a party plaintiff pursuant to Rule 24(a) of the Federal Rules of Civil Procedure.

7. Alternatively, because Pan Am has claims against Attorney General Mattox and also has defenses in the removed Texas state court action which constitute questions of law and fact in common with the questions of law and fact in this proceeding, Pan Am seeks leave for permissive intervention as a party plaintiff pursuant to Rule 24(b) of the Federal Rules of Civil Procedure.

8. Furthermore, Pan Am moves the Court to extend the protection of its preliminary injunction Order of January 30, 1989 to Pan Am, and its agents,

employees and representatives, and further moves the Court to enjoin defendant Mattox from his continued prosecution of the removed Texas state court action. In support of this Motion, Pan Am submits the attached memorandum of law, the Affidavit of John M. Bloodworth (Exhibit A), and a certified copy of Plaintiff's Original Petition in State of Texas v. Pan American World Airways, Inc. (Exhibit B).

[Signatures and certificate of service omitted in printing.]

[Title omitted in printing.]

AFFIDAVIT OF JOHN M. BLOODWORTH

BEFORE ME, the undersigned authority, personally appeared John M. Bloodworth, who being duly sworn, deposes and states as follows:

1. My name is John M. Bloodworth. I am over the age of 21 years, have never been convicted of a crime, and have personal knowledge of all the facts and opinions contained herein.

2. I have been employed by Pan American World Airways, Inc. (Pan Am) as Vice President of Advertising and Marketing since January 1989. Prior to that time, I was Managing Director of Advertising and Marketing for seven months. I commenced employment with Pan Am in March 1986 and have been involved in Pan Am's advertising since November 1986, when I became System Director of Advertising and Sales Promotion.

3. I am familiar with the regulatory framework within which major airlines operate in determining and publishing passenger air fares.

4. Pan Am establishes and advertises air fares for passengers on its commercial flights in accordance with federal law and guidelines, as articulated in the Federal Aviation Act and in the rules and regulations issued by the United States Department of Transportation (DOT) or its predecessor agency, the Civil Aeronautics Board (CAB). This, I believe, is

standard practice for most other domestic American airlines. To my knowledge, through 1987, such Federal laws, rules, and regulations provided the sole and exclusive legal authorities for determining what constituted fair, unfair, or deceptive practices in the advertising and pricing of commercial air fares. In August of 1987, the National Association of Attorney Generals (NAAG) first started to exert pressure on Pan Am and other airlines to make broad changes in their commercial air fare advertising.

5. In 1987 and 1988, Pan Am received copies of a proposed set of guidelines on advertising and marketing practices for air fares ("Guidelines") issued by NAAG. Following the adoption of such Guidelines over various airline industry objections, including Pan Am's, certain NAAG members threatened to file lawsuits for alleged violations of various state consumer protection laws, based on the members' interpretation of those Guidelines, in an attempt to control the advertising practices of commercial airlines.

6. Specifically, Stephen Gardner, Texas Assistant Attorney General, threatened Pan Am on behalf of Texas Attorney General Jim Mattox, a member of NAAG, that Mattox would sue Pan Am for deceptive advertisement of air fares. See the attached copy of Mr. Gardner's letter of November 14, 1988, addressed to me (Exhibit 1). In addition to issuing this threat on behalf of the Attorney General and the State of Texas, Mr. Gardner also purported to serve this "formal notice of intent to sue" on behalf of the States of

California, Massachusetts, New York and Washington (Id.)

7. On February 28, 1989, Mr. Gardner carried out this threat by commencing an action in the District Court of Dallas County, Texas, 101st Judicial District (Cause No. 89-2510E), seeking to restrain certain advertising by Pan Am in Texas, allegedly on the ground that such advertising is deceptive and in violation of Texas Business and Commercial Code Sections 17.41 et seq. Such enforcement action apparently has been taken as a continuation of the concerted efforts of certain NAAG members to implement and enforce their Guidelines through state law. The filing of this action also demonstrates that the threat by Mr. Mattox last November was also backed by an intent to actually follow through on the threat and file suit. Attorney General Mattox has taken this step despite his involvement in the present proceedings where similarly situated airlines sought to enjoin such enforcement actions, and despite this Court's preliminary injunction against the Attorney General's initiation of such actions.

8. By his threats and through the coercive act of filing suit against Pan Am, Attorney General Mattox is seeking to compel Pan Am, and other airlines similarly situated, to include in their published air fares and in their advertising the $3.00 international departure fee, the $10.00 customs and immigration fee, and the $10.00 security surcharge which Pan Am and other airlines currently impose on transatlantic air travel. While the first two fees are mandated by federal law (and are collected by all airlines in the transatlantic market), the

$10.00 security surcharge is levied only by certain U.S. flag carriers. The security surcharge has been assessed by Pan Am since 1986, in connection with the provision of security services against air piracy and terrorism in the transatlantic air travel market.

9. The actions of Mr. Mattox and the threatened acts by NAAG and/or certain of its other members portend that in the future, Pan Am and other airlines will have to comply not only with Federal law, but also with the laws of many or all 50 states, the U.S. territories and local enactments, in formulating their advertising of air fares. Such a disparate regulatory scheme would undoubtedly create confusion for the customer and inconsistency among each jurisdiction's regulatory requirements for airline advertising. Furthermore, Pan Am would be exposed to lawsuits not only in Texas, but in each other jurisdiction seeking to regulate advertising, even though that advertising meets the existing, uniform federal standards.

10. Pan Am regularly advertises its transatlantic and other rates, routes, and services, including advertisements in newspapers and other publications that circulate in Texas. These advertisements completely disclose the three transatlantic surcharges in the aggregate. The charges are usually described in this manner: "$23 U.S. departure tax, security surcharge and custom fees not included." A sample advertisement published in several Texas newspapers during the last three months of 1988 is attached hereto as Exhibit 2. The advertisement in the attached Exhibit 2 is in full compliance with all present

federal laws and regulations, including DOT rules, regulations and enforcement policies. The practice of advertising transatlantic surcharges separately from the total advertised air fare has been specifically approved by the DOT.

11. Adherence to the NAAG Guidelines with respect to the $23.00 in fees assessed by Pan Am upon transatlantic travellers poses several threats to both consumers and the airline industry. Pan Am's advertising in the broadcast media will necessarily contain less information than under the present federal regulatory scheme which the DOT has fostered, as only a limited amount of information can be effectively communicated in 30 or 60 second spots. It simply is not possible to make all the disclosures which the NAAG Guidelines require in such short time periods. The likely result of such compliance will be that advertisements either will contain no air fare information at all or that airlines, including Pan Am, will place fewer broadcast advertisements containing air fare information. If Pan Am and other airlines lose their ability to publicize fare reductions quickly and effectively through the broadcast media, which would be one result of full compliance with the NAAG Guidelines, the airlines will lose much of their incentive to cut fares. Moreover, the decrease in information available to the public will undoubtedly have a negative impact on the public's ability to gauge comparative prices and to gather meaningful information regarding air travel.

12. Compliance with the NAAG Guidelines will also provide a distinct competitive

advantage for foreign flag carriers. Pan Am already discloses in its advertisements the existence and amounts of fees and surcharges in full compliance with DOT rules and regulations. (See Exhibit 2.) If Pan Am is compelled to include the $10.00 security surcharge in its stated air fare, it will appear that Pan Am charges a higher air fare than its foreign counterparts, because the latter do not assess a security surcharge. This will compel Pan Am, and similarly situated airlines, to consider whether the imposition of a security surcharge places them at a competitive disadvantage with respect to foreign-flag carriers.

13. Compliance with advertising policies set forth in the NAAG Guidelines forces Pan Am to contend with the possibility of responding and adhering to inconsistent and conflicting federal and state regulatory schemes. Television advertising has already been complicated and adversely affected by the increased use of superimposed legends and mandatory audio disclosures which the NAAG Guidelines require. Newspaper advertisements can no longer incorporate a large number of prices for multiple destinations, because of space limitations. These developments have already created a significant disincentive against price competition. They have also engendered continuing problems for Pan Am, which must address inconsistent and overlapping state and federal enforcement policies.

14. Pan Am should not be required to regulate its national advertising to conform either to Texas' expectations or to those of any

other state, group of states, or local governments. This is particularly true where, as here, some states have refused to adopt the NAAG Guidelines (New Mexico), and others have chosen to adopt some (but not all) of such Guidelines as expressions of their state laws (such as North Dakota). Neither Pan Am nor other similarly situated carriers should be required to comply with, or face the possibility of complying with, many different state, territorial, and local regulatory schemes, in addition to the already comprehensive federal scheme.

15. As noted in the attached Exhibit 2, Pan Am's advertising on its face discloses the existence of an aggregate of $23.00 in transatlantic fees (which amount includes the $3.00 international departure tax, the $10.00 customs fee, and Pan Am's security surcharge of $10.00 on transatlantic flights). Thus, these advertisements disclose the total amount of the transatlantic surcharges and contain nothing that is deceptive or misleading to the citizens of the State of Texas.

16. Although we have attempted to estimate the impact on Pan Am's revenues and the number of passengers who would switch from Pan Am to other carriers if Pan Am is forced to comply with the NAAG Guidelines, we have found that it is impossible to do so. There is no way for us to determine how many people would book flights on foreign flag carriers in lieu of Pan Am because of the highlighted price difference occasioned by including the security surcharge in advertised prices. Nevertheless, there can be no question that there would be a loss of

customers and a resulting decrease in revenue even though we have no way at this time to quantify the dollar amount of such loss to Pan Am.

[Signature and jurat omitted in printing.]

[Letterhead of Texas Attorney General]

November 14, 1988

VIA FEDERAL EXPRESS

John Bloodworth
Director of Advertising and Sales Promotion
Pan American World Airways
200 Park Avenue
New York, NY 10166

Re: Disclosure of fare surcharges in advertisements

Dear Mr. Bloodworth:

I am writing on behalf of the States of California, Massachusetts, New York, Texas, and Washington to reaffirm the position of the states regarding fare surcharges in advertisements. It is the position of the states that any fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare. Failure to do so violates our respective state consumer protection laws.

Specific surcharges which must be included in the advertised fare are

- the $3.00 international departure fee,
- the $10.00 customs fee,
- the "security" surcharge (usually $10.00), and
- any fuel surcharge.

It is no defense to claim that the surcharges are disclosed elsewhere in the advertisement. The deception, and thus the violation of our laws, occurs when the advertisement states a specific amount for a fare which is not in fact the true cost because the surcharges have been factored out. This deception cannot be cured by a footnote or other separate reference.

The states do not wish to burden airlines unduly with respect to advertising their fares. Full disclosure in this instance is actually simpler – no footnote is required and there is therefore less "clutter" in the advertisement.

More importantly, our citizens – and your customers – will not be deceived by inaccurate information.

The states are aware that the United States Department of Transportation ("DOT") has taken the position that factoring out some surcharges is proper. In Orders 8-3-25 and 88-8-2, DOT has condemned fuel surcharges but has condoned the three international fare surcharges (departure, customs, and "security").

This position taken by DOT is contrary to its own existing regulation (14 CFR §399.84) which says, in relevant part:

> "[A]ny advertising or solicitation...for passenger air transportation...that states a price...[is] an unfair or deceptive practice, unless the price stated is the entire price to be paid by the customer...for such air transportation... ."

The states believe that DOT itself violated the law when it issued these orders. Accordingly, the states signing this letter, together with 22 other states, have sued DOT for its illegal actions. That case is now pending in the United States Court of Appeals for the District of Columbia Circuit in Washington, D.C. (Docket Nos. 88-1348 and 88-1682). It is scheduled for oral argument on January 23, 1989.

The states are also aware that certain members of the industry have voiced the opinion that state enforcement of our consumer protection laws has been preempted by the DOT. The states disagree. Regardless of whether DOT is willing to allow deceptive advertising, the states are not. Our analysis of the law of preemption in this area convinces us that the states are free to protect our citizens from deception by enforcing our state consumer protection laws. We believe that this position fully comports with the Administration's own policy on preemption as expressed in Executive Order 12612, issued on October 26, 1987.

We are, however, aware that the apparent attempt by DOT to contravene the law by allowing surcharges has possibly created an atmosphere of confusion in the industry. Airlines may believe that they only need to comply with the DOT position.

This is not the case. Airlines may comply with the laws of the states without conflicting with DOT policy, and accordingly they must do so. This letter has been sent to every airline which we have identified as deceiving the public through surcharge advertising. This is the final opportunity to cure your violation of the state laws.

This letter serves as formal notice of intent to sue as required by our respective state laws. If your airline deceptively advertises fares in the future, you will be subject to being sued without further notice or opportunity to cure.

To allow time to bring your advertising into compliance, we will not take action until after November 30. Any advertisement which appears prior to December 1 will not be the subject of legal action by the states signing this letter, *unless* a deceptive advertisement appears on or after December 1.

If you have any questions regarding the position stated in this letter, we encourage you to contact us for further discussions.

It is our desire that, having made our position clear, we may expect cooperation from all airlines in preventing future deception.

Very truly yours,

/s/STEPHEN GARDNER
Assistant Attorney General

NO. 89-2510

STATE OF TEXAS	§	IN THE DISTRICT
	§	COURTS OF
Plaintiff,	§	
	§	
V.	§	DALLAS COUNTY,
	§	TEXAS
	§	
PAN AMERICAN WORLD AIRWAYS, INC.,	§	
	§	
	§	101ST JUDICIAL
Defendant	§	DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF THE COURT:

The State of Texas, Plaintiff, acting by and through Attorney General Jim Mattox, complains of Pan American World Airways, Inc., ("Pan Am") Defendant, and for cause of action would respectfully show the Court the following:

Jurisdiction

1. This action is brought by Attorney General Jim Mattox, through his Consumer Protection Division, in the name of the State of Texas and in the public interest under the authority granted to him by Section 17.47 of the Texas Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §17.41 *et seq.* ("DTPA") upon the grounds that Pan Am has engaged in false, misleading and deceptive acts and practices in the conduct of trade

and commerce as defined and declared unlawful by DTPA §17.46.

Defendant

2. Pan Am is a corporation incorporated under the laws of the state of New York. Defendant may be served with process by serving its registered agent for service of process, C.T. Corporation System, 811 Dallas Avenue, Houston, Texas 77002.

Venue

3. Venue of this cause of action lies in Dallas County, as provided by and based upon Civil Practices and Remedies Code §15.036 and DTPA §17.47(b) on the following grounds:

a. The cause of action or a part thereof accrued in Dallas County, Texas in that Pan Am has engaged in false, misleading and deceptive acts and practices in trade and commerce in Dallas County, Texas, as set forth in paragraphs 9-29.

b. Pan Am's advertising activities, as set forth in paragraphs 9-29, have occurred in Dallas County, Texas.

c. Pan Am has done business in Dallas County, Texas, as set forth in paragraphs 9-29.

Public Interest

4. By reason of the institution and operation of the unlawful practices set forth herein, Pan Am has caused irreparable injury, loss, and

damage to the State of Texas, and will also cause adverse effects to legitimate business enterprise which conducts its trade and commerce in a lawful manner in this state. Therefore, the Consumer Protection Division believes and is of the opinion that these proceedings are in the public interest.

Notice Before Suit

5. At least seven days before instituting this cause, the Consumer Protection Division informed Pan Am herein in general of the alleged unlawful conduct of which complaint is now made, pursuant to §17.47(a) of the DTPA.

Trade and Commerce

6. At all material times herein, Pan Am has engaged in conduct, as more fully set forth herein, which constitutes "trade" and "commerce" as those terms are defined by DTPA §17.45(6).

Acts of Agents

7. Whenever in this petition it is alleged that Pan Am did any act, it is meant that Pan Am performed or participated in such act or that such act was performed by the agents or employees of Pan Am and in each instance, the agents or employees of Pan Am were then authorized to and did in fact act on behalf of Pan Am.

Nature of Defendant's Deceptive Practices

8. Pan Am is a commercial air carrier which operates scheduled flights into and out of Texas for both domestic and international destinations.

9. As part of its operations, Pan Am advertises its services in Texas.

10. Frequently, Pan Am advertises heavily-restricted low fares.

11. A major purpose for advertising these fares at a very low price is to attract passengers who would otherwise choose another carrier.

12. Air carriers frequently compete on the basis of low air fares, alone and apart from amenities such as meals.

13. In fact, the competition for passengers often becomes so intense that carriers engage in fare wars, striving to match or beat the competitors' fares, if only by a few dollars.

14. At the current time, international air travel is in a slump, due in part to the in-air terrorist bombing of a Pan Am flight in Europe, and consumers' understandable fear of air travel to destinations such as Europe.

15. When travel is down, the time is particularly ripe for fare wars, or other forms of fare price competition.

16. In order that competition between Pan Am and other air carriers work properly, the fare information to consumers must accurately reflect the true cost of flying. Unfortunately, recent actions by Pan Am have prevented full and open competition.

17. Beginning on or about February 23, 1989, Pan Am caused advertisements to be placed in major newspapers in Texas, which prominently displayed an air fare of $149 to Europe, the Caribbean, Central

America, and Venezuela in numbers nearly three inches high. A copy of such advertisement from the *Dallas Times Herald* dated February 23, 1989 is attached as Exhibit A. (The Exhibit is reduced in size from the original, which is approximately 18 inches high by 11 inches wide.)

18. Although three-inch-high letters proclaim the $149 fare, Pan Am discloses in one-quarter-inch-high type that this is based on a $298 round-trip purchase.

19. Further down the page, in extremely confusing language, Pan Am goes on to state the "catch" -- a prior $160 minimum ticket purchase and trip between February 21, two days before the ad appeared, and March 3, eight days after the ad appeared.

20. Even a passenger who manages to make the immediate decision to travel within the week will discover that the actual fare is more than $298.

21. For all European destinations, Pan Am adds to the $298 a total of $23 in additional charges, consisting of:

- $3 departure tax,
- $10 customs and immigration fees, and
- $10 "security surcharge."

This "disclosure" is made in one-eighth-inch-high type (24 times smaller that the $298 price advertised).

22. The $3 departure tax is required by federal law to be included in the full fare.

23. The $10 customs and immigrations fees are required by federal regulation to be included in the full fare.

24. The $10 security surcharge is totally fictitious. It is neither a tax, nor a fee, nor any other form of governmental impost. It is, in truth, merely an additional revenue source for Pan Am.

25. By deleting these $23 in surcharges from the advertised fare, Pan Am has artificially and deceptively lowered its apparent fare from $321 -- the true cost -- to $298. This is a false "discount" of more than 7%.

26. This is classic bait-and-switch advertising. Pan Am baits the consumer with one price -- $298 -- but then switches to another when the consumer takes the bait and telephones or comes to an agent to buy a ticket.

Deceptive Trade Practices

27. Pan Am, in the course and conduct of trade and commerce, has engaged in false, misleading and deceptive acts and practices in violation of DTPA §§17.46 (a) and (b), including but not limited to the following:

a. Failing to include any fuel, tax, or other surcharge to a fare for air travel in the total advertised price of the fare;

b. Engaging in bait and switch advertising;

c. Representing that its goods and services have characteristics that they do not have;

d. Advertising goods and services with the intent not to sell them as advertised;

e. Making false and misleading statements of fact concerning the amount of price reductions; and

f. Failing to disclose information concerning Pan Am's goods and services which is known to Pan Am and which Pan Am fails to disclose with the intent to induce consumers to enter into transactions with Pan Am into which they would not have entered had Pan Am not disclosed the information.

Injury to Consumers

28. By means of the foregoing unlawful acts and practices, which were producing causes of injury to the persons affected, Pan Am has acquired money or other property from identifiable persons to whom such money or other property should be restored, or who in the alternative are entitled to an award of damages.

29. By reason of the institution and continued operation of the acts and practices described hereinabove, Pan Am has violated and will continue to violate the laws herein alleged. Pan Am, unless restrained by this Honorable Court, will continue violations of the laws of the State of Texas and immediate and irreparable injury, loss and damage will result to the State of Texas and to the general public.

Prayer

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Pan Am be cited according to law to appear and answer herein, that a temporary restraining order be issued immediately without notice, that after due notice and hearing a Temporary Injunction be issued against Pan Am, and upon final hearing, a Permanent Injunction be issued enjoining Pan Am, its associates, officers, agents, servants, employees, and attorneys and those other persons in active concert or participation with Pan Am who receive actual notice of this injunction by personal service or otherwise, from engaging in the following acts or practices:

1. Failing to include any fuel, tax, or other surcharge to a fare for air travel in the total advertised price of the fare.

2. Engaging in bait and switch advertising;

3. Representing that its goods and services have characteristics that they do not have;

4. Advertising goods and services with the intent not to sell them as advertised;

5. Making false and misleading statements of fact concerning the amount of price reductions; and

6. Failing to disclose information concerning Pan Am's goods and services which is known to Pan Am and which Pan Am fails to disclose with the intent to induce consumers to enter into transactions with Pan Am into which they

would not have entered had Pan Am not disclosed the information.

Plaintiff further prays that upon final hearing this Court order Pan Am to compensate identifiable persons for actual damages or restitution of money which was acquired by Pan Am by means of the unlawful acts and practices cited herein.

Plaintiff prays that Pan Am be ordered to pay civil penalties in the maximum amount authorized by the DTPA, as well as court costs and attorneys fees pursuant to Section 402.006(c) of the Texas Government Code. Plaintiff further prays that this Court grant such other relief as the Plaintiff may show itself to be entitled.

Dated February 28, 1989
[Signatures and clerk's certificate omitted in printing.]

London Roundtrip +Hotel+Car=

$298

It's the kind of deal that makes you want to run for the phone. Actually, it's three deals in one.

Unbelievably low fares to London, or elsewhere in Europe.

Imagine $298* roundtrip to London. Or a fare just as surprising to many other popular TWA destinations in Europe.

Just fly over between October 16 and December 7, any day Sunday through Wednesday, and return any Monday through Thursday by December 15, 1988. If you buy your ticket before October 1, there is no advance purchase, just purchase your ticket within 48 hours of reservation. But please plan carefully – this incredibly low fare is nonrefundable.

Stay 3 paid nights in a great hotel and the next 3 are free.

Stay three consecutive nights in any of nine exclusive London Trusthouse Forte Hotels, and the next three nights, out in the lovely English countryside, are on us.** The offer is good at any of over 200 charming Trusthouse Forte Hotels throughout Great Britain.

Just make your advance hotel reservation and stay from October 1, 1988 through March 31, 1989. For more information, call Trusthouse Forte Hotels directly at 1-800-225-5843 and ask about TWA's "Countryside Special."

Drive an Alamo rental car, 3 days free.

Starting from the day you arrive in London, you'll get three days' free use of an Alamo economy car with unlimited mileage.* If you want to keep it longer, the rate is only $17 a day.

All you do is reserve the car in advance, directly with Alamo, and show your TWA ticket when you arrive. For more information, call Alamo at 1-800-732-3232 and ask about TWA's "London Special."

So if you've been thinking about London lately – or even if you haven't – call your travel agent, or TWA in New York at 212-290-2141 or 516-222-9212, New Jersey, 201-643-3339, or elsewhere at 1-800-892-4141.

TODAY'S TWA.
FIND OUT HOW GOOD WE REALLY ARE.™

TWA

BEST AVAILABLE COPY

[Text of advertisement on preceding page.]

London Roundtrip
+ Hotel + Car =
$298

It's the kind of deal that makes you want to run for the phone. Actually, it's three deals in one:

Unbelievably low fares to London, or elsewhere in Europe.

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TODAY'S TWA.
FIND OUT HOW GOOD WE REALLY ARE.

TWA

*Fare conditions: VLXNR Minimum stay 7 days maximum stay 21 days U. S. departure tax, security surcharge and customs fee totaling $23 not included. Fare is nonrefundable, subject to change, and government approval. 45 day advance purchase within 48 hrs of reservation applies to tickets purchased from 10/1-10/23/88. Seats are limited. **London (Countryside Special) Hotel Offer: Hotel rooms are subject to availability, and passengers must originate in U.S. Offer is not combinable with any other Trusthouse Forte promotional or seasonal weekend rates. Alamo Car Offer: Fuel surcharges,

taxes, optional items not included. Standard Alamo driver qualifications apply. Subject to availability. Automative transmission model are available for a slightly higher rate. Offer is not valid 12/16-12/31/88.

[Other non-text material omitted in printing.]

[Title omitted in printing.]

ORDER

Came on this date to be considered the Motion of Pan American World Airways, Inc. ("Pan Am") for Leave to Intervene in the above-styled cause. The action pending against Pan Am in the United States District Court for the Northern District of Texas, Dallas Division, has been transferred to this Court and consolidated with the present action. The Court, therefore, has determineed that the Motion to Intervene should be granted pursuant to Rule 24(b)(2), and that the protective order issued by this Court be broadened to include Pan Am.

IT IS SO ORDERED.

SIGNED this 26th day of May, 1989.

/s/WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

[Title omitted in printing.]

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

HERSCHEL T. ELKINS, being duly sworn, hereby deposes and says:

1. My name is Herschel T. Elkins. I am a citizen of the United States and a resident of the State of California. I live and work in Los Angeles, California. I am over 18 years of age.

2. I am Senior Assistant Attorney General of the State of California and I head the Consumer Law Section which files court actions on behalf of Attorney General John K. Van de Kamp in regard to violations of California's false advertising and deceptive and unfair business practices statutes. In his capacity as attorney general, Attorney General John K. Van de Kamp has been named as a defendant in the amended complaint in the captioned case (hereinafter, the "Amended Complaint").

3. I make this affidavit for the purpose of attacking the truthfulness of certain material, factual allegations contained in the amended complaint with respect to subject matter jurisdiction and personal jurisdiction insofar as such allegations are or purport to be addressed to Attorney General John K. Van de Kamp or the State of California. I understand and intend that this affidavit will be filed in support of a motion or motions to dismiss the amended complaint for lack of subject matter jurisdiction and lack of personal jurisdiction

pursuant to Rule 12(b)(1), Rule 12(b)(2), and Rule 12(b)(6) Federal Rules of Civil Procedure.

4. As the chief law enforcement officer of the State of California, Attorney General John K. Van de Kamp enforces the laws of this State. The amended complaint alleges, in relevant part, paragraphs 7 and 37, "The threatened enforcement of these (NAAG) Guidelines by (Defendant Texas) Attorney General Mattox, issuing out of this district (W.D. Texas) on behalf of himself and other attorneys general in concert, gives rise to this complaint." Contrary to this allegation, Attorney General John K. Van de Kamp has not threatened nor could he threaten to enforce the NAAG Guidelines on airline advertising. These guidelines are not laws and do not pretend to have the force and effect of law. If an airline engages in false advertising in this State and a lawsuit is filed by our offices, it would be filed pursuant to California's false advertising statutes (Business and Professions Codes sections 17535 and 17536) and California's unfair business practices statutes (Business and Professions Codes sections 17204 and 17206). Therefore the factual allegations in paragraphs 7, 37, 38, 60, 68, 73, 77 and 80 do not apply to the State of California.

5. The amended complaint further alleges "Attorney General Mattox . . . has acted as agent for the other defendants in spearheading the creation, implementation and enforcement of the NAAG Guidelines by its various members." Attorney General Mattox has not been authorized to act as Attorney General John K. Van de Kamp's agent nor as agent for the State of California, and to the best of my knowledge has not acted as Attorney General John K. Van de Kamp's agent nor as agent for the

State of California in any alleged enforcement of the NAAG Guidelines or otherwise. While the State of California has worked cooperatively with the State of Texas and other states to tackle the problem of deceptive airline advertising, representatives from our office have always acted independently of Texas and other states in these cooperative efforts, and have sought only to protect the interests of California consumers and to enforce California law.

6. Despite numerous references in the amended complaint to "State Attorneys General . . ." acting "in concert with other attorneys general . . .", "to implement or enforce the guidelines", neither California nor Attorney General John K. Van de Kamp acts in concert with any other state to enforce guidelines or state law. As Attorney General of the State of California, Attorney General John K. Van de Kamp acts independently to enforce the laws of this State. Attorney General John K. Van de Kamp does not have the authority to enforce the laws of any other state. Contrary to plaintiffs' implications in their amended complaint, neither NAAG nor any other state attorney general ever makes a determination for California or for Attorney General John K. Van de Kamp as to when California should or will take enforcement action. Nor would California nor Attorney General John K. Van de Kamp ever presume to dictate to other sovereign sister states when or if they should take enforcement action. Therefore the factual allegations in paragraphs 7, 37, 50, 72 and 77 do not apply to the State of California.

7. Attorney General John K. Van de Kamp does not do business in Texas nor have the authority to enforce Texas law.

8. Neither California nor Attorney General John K. Van de Kamp consents to this Court's jurisdiction over his person.

[Signature and jurat omitted in printing.]